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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1104

HUGH B. MONJAR, ALSO KNOWN AS H. B. MONJAR,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1105

JOSEPHINE T. MONJAR,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1106

ABRAHAM J. COOK, ALSO KNOWN AS A. J. COOK,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1107

JOHN FENTON JONES, ALSO KNOWN AS J. F. JONES,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

No. 1108

CLEMENT O. DREW, ALSO KNOWN AS C. O. DREW,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

DANIEL O. HASTINGS,
WILLIAM A. GRAY,
HOMER CUMMINGS,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 1104-1108

HUGH B. MONJAR, Also Known as H. B. Monjar; JOSEPHINE T. MONJAR; ABRAHAM J. COOK, Also Known as A. J. Cook; JOHN FENTON JONES, Also Known as J. F. Jones; CLEMENT O. DREW, Also Known as C. O. Drew,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners, Hugh B. Monjar, Josephine T. Monjar, Abraham J. Cook, John Fenton Jones, and Clement O. Drew, pray that writs of certiorari be issued to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on December 1, 1944, affirming the judgments of the United States District Court for the District of Delaware.

Opinions Below

The opinion of the District Court on demurrer to the indictment (A. 111a),[1] is reported in 47 F. Supp. 421. Other opinions of the District Court on the admissibility of certain exhibits offered by the Government (A. 216a), and denying motion for directed verdict (A. 227a) are not officially reported. The opinion of the Circuit Court of Appeals (SA. 185-198) is not yet officially reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on December 1, 1944 (SA. 198-201). The petitioners timely filed a petition for rehearing (SA. 207-226). The Circuit Court of Appeals on January 26, 1945 (SA. 227), and on February 24, 1945 (SA. 227-228), entered orders amending its opinion. Order denying petition for rehearing was entered February 28, 1945 (SA. 229). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court, May 7, 1934.

Questions Presented

1. Whether a conviction for use of the mails "in the sale" of a security in violation of Section 17 of the Securities Act of 1933 can be sustained where the evidence shows that the only use of the mails or any means of interstate communication by defendants—a report by the vendor's agent to the vendor of the fact of sale—occurred subsequent to the com-

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[1] References herein are to:
"A.—" Petitioners' Appendix
"SA.—" Petitioners' Supplemental Appendix
"GA.—" Government's Appendix
"R.—" The stenographic transcript.

pletion of the sale of the alleged security, involved no solicitation of, or communication to, the purchaser, and was not for the purpose of lulling the purchaser, or concealing the sale, and fails utterly to show that the use of the mails or interstate means of communication was in any way in furtherance of the sale.

2. Whether, when the evidence relied upon by the Government to establish the sale of "a security" in a prosecution under Section 17(a) of the Securities Act of 1933 consists not only of a document but as well of testimony as to alleged oral representations at the time of its transfer, the question as to the sufficiency of the evidence to establish the sale of "a security" within the statutory meaning of that term may be determined by the Court as a matter of law and withdrawn from the jury, or is properly to be submitted to the jury under instructions as to the applicable law.

3. Whether admissions by defendants as to essential elements of the crime charged made by defendants to an investigating agent of the United States Bureau of Internal Revenue, and procured and induced as a direct result of his promise not to cooperate with a pending SEC investigation, are as a matter of law within the privilege against self-incrimination under the Fifth Amendment.

4. Whether, where in an indictment including numerous substantive counts for violation of the mail fraud statute and of Section 17(a) of the Securities Act of 1933, and one count for conspiracy to violate such statutes, each count of the indictment alleges a single scheme to defraud by organizing a club so that the defendants could fraudulently obtain money from persons joining the club, and where the case is tried on the theory that the club was set up to carry out the scheme to defraud and that but a single scheme is in-

volved, and where the jury was instructed that the defendants could be found guilty only if it found the alleged scheme was devised prior to organization of the club—Whether the evidence is sufficient as a matter of law to sustain conviction on any count of the indictment where a finding of fradulent purpose on the part of any of the defendants at the time of the organization of the club (in 1928) can be made only by the violent assumption that, from actions of some of the defendants (in 1934, a year after the club was reorganized for expansion) allegedly evidencing their fraudulent intent immediately prior thereto, it may be retrospectively inferred that such fraudulent purpose and intent existed at the time the club was formed more than five years earlier.

Statutes Involved

The Act of May 4, 1909, c. 321, sec. 215, 35 Stat. 730 (18 U. S. C. Sec. 338) provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * to be sent or delivered by the post office establishment of the United States, or shall take or receive * * * therefrom, any such letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both."

The Securities Act of 1933, May 27, 1933, c. 38, Tit. I, 48 Stat. 84 (15 U. S. C. sec. 77) provides:

> Sec. 17(a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or

indirectly—(1) to employ any device, scheme, or artifice to defraud * * *. (15 U. S. C. sec. 77q(a))

* * * * * * *

Sec. 24. Any person who wilfully violates any of the provisions of this subchapter * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both. (15 U. S. C. sec. 77x).

Statement

Petitioners were named as defendants in an indictment in 25 counts: 17 substantive counts (counts 1 to 15, 23 and 24) charging violation of the Mail Fraud statute; 7 substantive counts (counts 16 to 22) charging violation of the fraud provisions of the Securities Act; and one count (count 25) charging conspiracy to violate both the Mail Fraud statute and the fraud provisions of the Securities Act (A. 19a-95a). There was a directed verdict for defendants on counts 1, 4, 9, 19 and 22. Verdict of guilty on all of the 20 remaining counts was returned against all the defendants except Josephine Monjar, who was found guilty on the conspiracy count alone (A. 8a). The defendant Hugh B. Monjar was sentenced on the 14 mail fraud counts to imprisonment for five years on count 2, and one year on each of the others, sentences to run concurrently, and to pay cumulative fines of $1,000 on each of the 14 counts; on each of the five Securities Act counts, to one year imprisonment and $5,000 fine, sentence to run concurrently with that on count 2; and on the conspiracy count, to one year imprisonment concurrent with that on count 2, and $10,000 fine, a total of $49,000 in fines (A. 9a-10a). With the exception of Mrs. Monjar, each of the other defendants was sentenced to serve three years on count 2 and one year on each of counts 3, 5, 6 and 7, and one month on all remaining counts, all to run concurrently with the sentence on count 2, and to

pay cumulative fines of $1,000 on counts 2, 3, 5, 6 and 7, a total of $5,000 each. Mrs. Monjar was sentenced to serve a term of 18 months and pay a fine of $10,000 on count 25 (A. 10a-11a). The Circuit Court of Appeals affirmed (SA. 198-201) and denied petition for rehearing (SA. 229).

Investigation.—In December, 1941, an indictment was found against some of the officers and local members of the Mantle Club in Pittsburgh, Pennsylvania. A general investigation by the Securities and Exchange Commission ensued and the Internal Revenue levied a jeopardy assessment against all the funds in the banks of Wilmington standing to the credit of the Mantle Club (R. 5124-5126, 17-22-1726). At the behest of the Securities Exchange Commissioner a grand jury investigation was commenced in January, 1942. On May 26, 1942 the indictment here involved was returned (A. 19a).

Indictment.—It alleged that the defendants had devised a scheme to defraud persons, members of the Mantle Club, and that "it was part of the scheme to defraud that the defendants would, during the year 1928, cause to be organized, and they did so organize" the Mantle Club (A. 20a-21a); that thereafter defendants and their associates would and did meet and listen to Monjar talk regarding their self-betterment and social and economic advancement; that from 1933 on defendants would and did organize Key Publishing Company and publish a magazine known as "American Key", and for that purpose solicit and obtain from their associates $400.00; that from 1933 on defendants would and did expand the Mantle Club and set up districts in many large cities, each controlled by a District Board of Governors (A. 21a); that defendants would and did amend the constitution of the Mantle Club to provide for the National Board of Governors of three persons; that Monjar, Cook, and J. F. Jones would and did become members of the three-man Board, to be self-perpetuating (A. 22a); that Monjar

should and did become editor of American Key Magazine, J. F. Jones President, and Cook Treasurer of Key Publishing Company (A. 22a); that Monjar as editor should receive from Five Hundred to Fifteen Hundred Dollars per month, and Cook and J. F. Jones each Five Hundred Dollars per month; that the Key magazine would be sold almost entirely to members of the Mantle Club at 25¢ per copy; that defendants would and did publish Monjar's writings as "The Code of Ethics" and "Supplement to the Code of Ethics", and sell same to members at Two Dollars per copy, with royalty of one dollar per book to Monjar, later reduced to twenty cents (A. 23a); that defendants, after the Mantle Club had been set up on a nation-wide basis, would and did solicit the members to make personal loans to Monjar (A. 24a-35a); that Monjar never intended to return the said loans (A. 32a); that among other things, it was falsely represented that the loans had nothing to do with, and were an activity separate and apart from the membership in the Mantle Club, whereas the defendants well knew that the Mantle Club had been organized so that Monjar could obtain money by means of personal loans from Mantle Club members (A. 31a).

The indictment further alleged that defendants would set up the Golden Braid Costume Company and from proceeds of said loans, cause a large sum of money to be paid to the sister of Monjar, and to his secretary, with which to purchase stock in said company, and that the latter (the defendant, Josephine Monjar) as president of said company, should receive Fifteen Hundred Dollars monthly salary, and that Monjar's sister and nieces should receive salaries from the same company; that Mantle Club should buy from it fifty thousand costumes though there were never fifty thousand members entitled to wear them (A. 36a-37a). It was also charged as part of the scheme that defendants would set up American Business Management Corporation

and, out of the proceeds of the loans, enable their associates to become stockholders and would cause them to be elected officers and directors thereof, and the company to pretend to render services to Golden Braid Costume Company and Key Publishing Company and make charges therefor, but furnish no services of value (A. 38a); that defendants would set up American Business Research Corporation and cause their associates to be officers and directors thereof, and loan said associates part of the proceeds of the aforesaid loans to buy stock of said corporation; similar allegations were made with respect to the setting up of Portland Research Corporation and American Distributing Corporation (A. 38a-39a).

The indictment then alleged that defendants would pay to themselves and their close associates out of moneys received from initiation fees and dues, large sums by way of salaries, bonuses, traveling and other expenses (A. 40a); that defendants would set up Independence Club of America, and pay themselves large sums by way of salary and expenses; that defendants, their agents and representatives, would make false representations to persons who had made loans to Monjar (A. 40a-42a); that defendants would cause dissatisfied persons to be told that if they had confidence in Monjar they would not apply for any refund (A. 42a).

The evidence.—The evidence (uncontested except as otherwise indicated) discloses the following facts:

Activities of Monjar antecedent to formation of the Mantle Club.—Hugh B. Monjar in San Francisco in October, 1924, organized a group known as the Decimo Club. He was its Chairman and Chief Executive, and with three others, constituted the Board of Governors. Its purpose was the securing of justice, protection and opportunity for its members. The initiation fee was $20.00, and the monthly dues $2.00. Originally the Club contracted to pay Monjar the initiation fees in full in consideration of his obtaining

members and otherwise managing the Club and paying organization expenses. After about one and a half years Monjar caused his contract with the Decimo Club to be altered to allow him only $5.00 of the $20.00 initiation fee. By 1927 the Club had spread to thirty-four cities from coast to coast, and had a gross membership of sixty-two thousand (GA. 1449a, 1450a). In 1925 Monjar, with his own money, set up the Apasco Purchase and Sales Corporation, owned and controlled by him, which enabled all members of the Decimo Club who subscribed to its services, to purchase various articles of merchandise at substantial discounts (R. 6078-6081). For instance, at Cleveland, fifteen hundred members, at a total cost of $4500.00, saved $40,000.00 (A. 516a). The Apasco was a great success (A. 515a-517a). By 1927 it had branch offices in twenty-seven cities (GA. 1450a) and Monjar had given several thousand shares to Decimo members (GA. 1451a).

In 1927 dissension sprang up in the Decimo Club, and charges were made against Monjar by its counsel, the then Attorney General of Massachusetts. As a result of this and other conduct, the said Attorney General resigned from public office to avoid impeachment, and was disbarred (A. 1454a). At the last minute Monjar, who was a candidate to succeed himself, as Chairman and Chief Executive of the Club, withdrew, as did his whole slate of officers, making way for the election of a new Board of Governors. This new Board made charges against Monjar which he denied. However, he turned over to an escrow agent, pending an audit, all of the stock of the Apasco Corporation, and all of the stock owned by it in the Drew Tailoring Company. In March, 1928, four months after Monjar's resignation, suits for receivers were brought against the Decimo Club on the ground that it was violating its charter after Monjar withdrew from it, by transacting business for profit. On trial the new Board of Governors failed to justify their

actions, and therefore the charter was revoked, a receiver was appointed, and the corporation was still in liquidation in 1931 (GA. 1444a, 1453a-1454a). It is uncontroverted that the Decimo Club was successful under Monjar's guidance (SA. 16, 17, R. 3346 and Gov. Ex. 155).

Mantle Club formation in 1928 and activity until 1933.—On January 11, 1928, one Robinson, of New York City, wrote Monjar suggesting formation of the organization that later became the Mantle Club (A. 454a). Monjar replied favorably (A. 455a-456a), and shortly thereafter others in northern New Jersey, Mr. Genor, Mr. Eldridge, and Mr. Cook, wrote Monjar suggesting the formation of a fraternal organization with Monjar as its leader (A. 456a-457a). The Mantle Club was not formally organized until January 17, 1929 (R. 6093), and during the intervening year there were intermittent discussions having to do with the constitution and by-laws. In these general discussions about fifteen or twenty persons participated at a few group meetings. Twenty-three persons signed the formation resolution of the Mantle Club (A. 458a). Mantle Club members and others totaling over one hundred, met each week for five years from 1928 to 1933 and listened to talks delivered by Monjar pertaining to their self-betterment and social and economic advancement (GA. 1120a; SA 43-44). By May of 1933 the Mantle Club had about seventy members (A. 459a; GA. 1119a). The Constitution drawn up two or three months after formation of the Club in 1929 provided for an elected Grand Tribunal of ten men (A. 458a, 465a). There were no initiation fees or monthly dues, merely assessments based on expenditures, actual or contemplated, in the immediate future (A. 459a).

Key Publishing Company organization.—The persons who listened each week for five years to Monjar's talks regarding self-betterment and economic questions, desired

a permanent record of his talks, and therefore, ten or fifteen men held meetings and decided that a magazine would be the best form for doing this. At the meeting at which publication of the magazine was agreed upon, there were present about one hundred (A. 460a-461a) and about one hundred subscribed for a total of about four hundred shares at one dollar per share. This was not limited to Mantle Club members (A. 462a). This group was known as the Group of 125 and was composed of members of the Mantle Club plus other individuals associated in the H. B. Monjar & Company, Inc.[2] vocational service (GA. 1119a, A. 452a). The stockholders of the Publishing Company themselves solicited annual subscriptions but later the business was put on a monthly sales basis (A. 462a-463a). Defendants Jones became President, A. J. Cook, Vice-President and Treasurer, and Monjar, Editor of the Magazine (GA. 23a-24a). At no time did Monjar own any stock (GA. 1662a, 1667a). It published a magazine known as "The Key Magazine", later changed to "The American Key".

The Mantle Club, 1933-1942.—As a result of publication of The Key magazine, inquiries were received in May, 1933 from readers in other cities as to whether Mr. Monjar proposed to set up another fraternal organization (A. 464a, GA. 1119a), and Mr. Summers, as a representative of a number of those in California who had been associated

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[2] H. B. Monjar Company, Inc., a New York corporation, was formed in 1928 to render vocational guidance to subscribers for an initiation fee of ten dollars plus monthly dues of two or three dollars. The national number of subscribers was approximately eight hundred, but due to adverse newspaper publicity, its membership was greatly reduced to approximately one hundred and twenty-five (GA. 1718a). It became dormant and was replaced by a new corporation rendering substantially the same services and known as Business Executives Association (GA. 1200a). Another organization known as the Holare Corporation was also brought into existence about the same time to furnish to its subscribers the service of obtaining discounts from wholesale distributors (GA. 1200a-1201a).

with Mr. Monjar in the Decimo Club, and others, none of whom were defendants herein, urged that a new fraternal organization be set up or that the existing Mantle Club be expanded with autocratic control to prevent the difficulty experienced with the Decimo Club (A. 464a, 466a). As a result of these requests, defendant Drew was sent to California to make a survey and reported that a California group sincerely wanted such a fraternal organization (A. 471a-472a). As a further result the club became national in scope and its constitution was amended to provide that the Grand Tribunal of ten members should be reduced to a three-man self-perpetuating Board of Governors (SA. 46; A. 481a-551a). This amendment was signed by all the seventy or eighty then members of the Mantle Club (A. 481a). Therefore, six of the nine members (one vacancy had not been filled) resigned, leaving Monjar, Cook and Jones as members of the new three-man Board of Governors (A. 403a, 472a, 481a, GA. 1121a). In 1940 the constitution was amended to provide that the local Board of Governors of each district unit, theretofore selected by the National Board of Governors (GA. 238a, et seq.) should be elected by the members. The members would also elect one representative to the National Council for each one thousand members. The National Council elected a ten-man National Board of Governors (A. 481a, R. 6228). This was done at a meeting of all the local Boards of Governors held in January 1940 in Chicago (A. 367a). The National Council held meetings in 1940, 1941, 1942 (A. 389a), and received and approved reports and certified audits regarding the Club's affairs including all expenditures by the National Board from 1933, and authorized from time to time further expenditures by the National Board (A. 388a-394a, R. 3308-2215).

From the time that, under the program of expansion, the first unit was established at Oakland, California, thirty

units were set up in most of the large cities of the United States (GA. 1506a), and by 1940, the Club had over $300,000 cash in the bank (Ex. A of Gov. Ex. 281F; SA. 121), and 34,991 members (GA. 1505a).

The Mantle Club and its mode of operation.—Under what was known as the Club's contact structure, a member upon joining was placed in a group of ten, one of whom was designated as Captain (GA. 243a), who during each week had personal contact with each man of his group regarding the application of the teachings of the Club (GA. 244a-245a, A. 341a). Each group of ten Captains was under the jurisdiction of a Division Head and in turn each group of ten Division Heads was presided over by a Section Head (GA. 244a, 1701a). Some of the larger units had as many as five Section Heads, indicating a membership in an individual city of more than 4,000 (GA. 357a). In joining, a prospective member was first invited to an investigation meeting (GA. 240a-248a). After paying an initiation fee of $20.00, he was told the history of Monjar and his early promotion of the Decimo Club, including phases of the opposition which had arisen to Monjar by various organizations (GA. 240a-248a, 1449a-1456a). After this explanation he was offered an opportunity to withdraw and the return of his initiation fee. If he did not withdraw, a speaker would explain further the history and purpose of the Mantle Club, and that Monjar had a definite set of business plans which were his own property, and that if Monjar should invite any individual to participate therein that would be a separate venture since the Mantle Club was a non-profit organization (GA. 246a-247a, 1415a-1416a, 1148a).

Subsequent to the investigation meeting, assimilation meetings were held at which the Club's purposes and principles and their application in every-day life were empha-

sized and references were made to the ability of Monjar (GA. 242a-246a). Frequently it was stated that Monjar's plans would be revealed to members as their record justified their getting the information (GA. 359a). Members were given co-points as evidence of their participation in certain activities of the Club (GA. 305a-309a, 335a-336a, 418a, 419a; Gov. Ex. 154; GA. 1457a, 847a-855a). These were awarded on the basis of 20 points for membership, 40 points for attendance at the official monthly meetings (OMM) and 40 co-points for payment of the dues of $2.00 at the monthly meeting.

The entire initiation fee was remitted to the National Board of Governors in Wilmington (Gov. Ex. 107, GA. 1414a). Fifty percent of the monthly dues of $2.00 were remitted to the National Board of Governors, and 50% retained by the local district (GA. 242a-243a). Detailed financial reports were required to be made by the local boards to the National Board, and expenditures by the former were subject to approval by the latter (GA. 342a-344a), but no disapproval was shown.

At the monthly and full-member meetings, addresses dealing with one or more of the principles discussed in the "Code of Ethics" and Key magazine were given by Club members selected in advance by the local Board of Governors. Inspirational talks were given, usually illustrated by the speaker's own personal experience in the application in his daily life of the ethical principles as taught by the Club, with highly beneficial results (A. 318a, 321a-322a, 324a, 331a, 333a, 336a, 341a-343a). After a recess for collection of dues there were similar talks followed by adjournment with the singing of a patriotic song (GA. 237a-252a). Over six thousand letters (samples of which appear in SA. 174-183) show the benefits received by members from the application of Mantle Club principles. Likewise, the results compiled from a questionnaire in 1941, showing all

sorts of benefits to large percentages of the members[3] (A. 623a). Many letters show very successful community work (SA. 171-174 and Def. Exs. 67-B and 74).

Upon joining, a person became an associate member, and upon it appearing that he was earnest and sincere in his Club activities, he advanced to full membership (GA. 1716a). There was a monthly meeting of full members and a number of special meetings of different kinds and for different purposes (GA. 237a-252a, 892a). At these meetings there was emphasized the importance and advantages of applying the Club's principles in every-day life, and the method of application was explained (A. 330a-331a, 336a-338a, 341a-343a; R. 7165-7167).

General letters, bulletins and instructions from the National Board to each local unit (Def. Exs. 11, 14, 32), the sports events, social affairs and picnics held by the local units and the civic and other activities (Def. Ex. 72) of the members together with regular study and constant teaching of club principles (Def. Ex. 66) and the application thereof to the life of each member, keeping full reports and attending many meetings (Def. Ex. 19) each month in accordance with the club's requirements kept the members quite busy at all times (Def. Ex. 32, 72, 45, R. 8456-8481).

The personal loans to Monjar.—In February 1934 Monjar wrote a letter to Clement O. Drew requesting him to present to some members of the Mantle Club an opportunity to make loans to him (Gov. Ex. 254; GA. 1638a). He speci-

[3] This questionnaire answered at a particular monthly meeting attended by a total of 28,370 out of a total membership of 33,900, showed that:

1. 97.85% had acquired increased friendships
2. 70.67% had their family life improved
3. 82.76% had more fully understood and fulfilled civic responsibilities
4. 45.96% had increased their income
5. 81.82% had more confidence in the future and felt more secure
6. 79.64% had received other values not mentioned.

fied that prospective lenders should understand that he would do all in his power to see that they would receive great benefit from their assistance, and that the minimum amount of the loans would have to be $3.00 per month for ten months, and the maximum $20.00 per month for ten months, to be payable only in monthly installments, so as to insure that he would have a definite income each month. Pursuant to this letter, and for eight years, Monjar and Drew, later assisted by one Elkin, together with agents (either acquitted or not indicted), conducted once each year the solicitation of personal loans from part of the members of some of the district clubs (GA. 1765a, 1777a; Gov. Ex. 293, 1507a) which were referred to as PL loans (GA. 480a-481a, 554a, Gov. Ex. 257). Certain individuals whom the PL agents believed were active club members [4] were asked to attend a meeting (GA. 480a-481a, 554a, 878a, 566a). At the meeting those attending were informed that it was not a Mantle Club meeting and the history of Monjar's prior activities and difficulties was told them (GA. 857a, et seq.). They were told that the loan was solicited on conditions fixed by the borrower, including the specified minimum and maximum size and the installment requirements. It was also stated that Monjar was to be permitted to do as he pleased with the money, and the money would be paid back by Mr. Monjar at his convenience, probably many years later (GA. 1681a). Occasionally Mr. Monjar himself addressed the meeting at which the personal loans were solicited (GA. 253, et seq., 365a et seq., 485a, 489a, 566a).

After the loans were solicited, someone belonging to the local unit was designated as the PL agent (Gov. Ex. 257, GA. 925a-931a). Usually installments of the loans were paid to the PL agent, after the adjournment of the

[4] No Club record of the members' financial standing was inspected (R. 3977-3978).

official monthly meeting of the Club (GA. 1472a). Upon payment the lender received a receipt as follows:

"Received of John Doe the sum of

$\$$_____

a/c HBM-PL No. _____"

This receipt was signed by the PL agent (GA. 419a-420a, 271a-272a). The moneys were transmitted by cashier's check or New York draft payable to the order of A. J. Cook, and addressed to him at Wilmington by mail (GA. 255a).

The loans continued annually for a period of eight years. At the end of six years the loans were called "CD" loans. These were numbered 1 and 2, and continued up to February 1942 (GA. 253a, 365a, 408a, 489a, 566a).

There was some sharply disputed and contested evidence from only six cities in the far west tending to show that financial rewards were promised as an inducement for making the loans, and that they had not been realized. The funds received from the loans were expended in appreciable amounts for the personal benefit of Monjar and his family (Gov. Ex. 263-276, and Gov. Ex. 294). Beginning about 1938, Monjar paid his former wife the sum of $1500.00 a month, or a total of about $118,000.00 (Gov. Ex. 294).

From sums obtained through these personal loans, Monjar paid an income tax assessment of $220,000.00 on profits from the Apasco Corporation. Although Monjar claimed the assessment to be improper, he forfeited his chance for a successful defense when his tax counsel failed to appear at the hearing. (45 F. Supp. 303, affirmed 132 F. 2d 990; GA. 740a-741a, 1768a).

During the period from 1934 until the latter part of February 1942, $1,280,042.81 was borrowed by Monjar, and

$238,727.00 returned. Thereafter, and by September 15, 1942, a large percentage of the members to whom these loans were owing made contributions for Monjar's benefit and in this way about $800,000 of these loans were repaid (A. 308a-315a).

Business of Key Publishing Company.—For his services as editor of Key Magazine, Monjar at times received salaries varying in amount, and sometimes as high as $1500 per month. In 1938 his saalry as editor was terminated (GA. 34a-36a). Jones and Cook, as officers of the company, at times received salaries as high as $400 per month in later years (GA. 33a, et seq.; Also, Gov. Ex. 297).

In 1937 the "Code of Ethics," a book consisting of a collection of Monjar's articles, was published and sold to members at $2.00 a copy, of which Monjar received $1.00 royalty. (GA. 32a-34a). A second volume of similar nature called "Supplement to Code of Ethics" was subsequently published and sold in the same manner and Monjar received the same royalty (GA. 37a-38a). Later his royalty on these books was reduced to twenty cents (GA. 21a, et seq.).

The Mantle Club itself bought large numbers of the Key Magazine for the purpose of being able to furnish the back numbers to new members who were likely to want them, as experience had clearly demonstrated. The magazine was not of merely current topical interest but rather discussed ethical principles and their practical application. On December 31, 1941, the Mantle Club included among its assets $133,306.35 worth of American Key Magazines purchased at the wholesale price of fifteen cents per copy and representing 888,709 magazines in the Publishing Company's warehouse (GA. 100a-101a). However, during the period April, 1933, to October, 1942, the total sales of current issues was 1,379,487, and 528,208 back issues were sold (Gov. Ex. 25, sheet 2, GA. 1364a, et seq.). As soon

as it appeared that the Key Publishing Company itself had funds to carry sufficient inventories of back issues to meet future demands of club members for them, the Club itself practically ceased purchases, and the Publishing Company took over the task. As of August 31, 1942, 897,777 copies were held by the Publishing Company and 889,856 copies by the Mantle Club (Gov. Ex. 30-31). It also appeared that from 1939 to 1942 sales by the National Board of back issues exceeded its purchase from and after 1939 (GA. 1366a).

The testimony of all Government witnesses was to the effect that the Key magazine was of considerable value to them (A. 316a-344a, Def. Ex. 74a, 74b). The intrinsic worth of the magazine to its readers was clearly recognized (R. 2155-2164, especially 2163; also (SA 174-177, being two of 1700 similar letters in Def. Ex. 74).

Golden Braid Costume Company.—This company was created to manufacture for Mantle Club members a ritual costume for $15.00 (Gov. Ex. 258). The total output of this company, about 50,000 costumes, was sold only to the Mantle Club (GA. 1505a) and by it in part resold to local units. The latter sold to members always at the price of $15.00 (GA. 1705a; Gov. Ex. 295). Only "full" members of the Club were authorized to wear the costume and the total membership by 1940 had grown to about 35,000 (GA. 1505a). It appeared that shipments by the National Board of Governors to the local Boards, which sometimes exceeded immediate needs, were based upon estimates of the probable future needs (GA. 756a-758a, 933a-936a, 1285a-1289a). As of December 31, 1941, the National Board had on hand and unsold about 27,000 garments valued at $399,000.00 (Gov. Ex. 295, GA. 1787a). The National Board of Governors anticipated a membership of about 100,000 for whom costumes would be wanted and otherwise difficult to obtain (GA. 1517a-1637a, R. 3380). They were worth the $15.00

paid for them, and the last 6600 were ordered at the direction of the National Council of the Club (A. 393a-394a and Article V of Def. Ex. 10; also A. 391a, A. 388a, and SA. 34-35).

The only dividends by the Company totaled $77,000.00 paid (before she married Mr. Monjar) to Mrs. Drew, the principal stockholder, and $17,900.00 paid to Mrs. Mason, a sister of Mr. Monjar (GA. 1791a). Just before Mrs. Drew married Mr. Monjar she sold and delivered her stock in the Costume Company to Edwin T. Elkin for $16,000.00, advanced on his behalf by defendant Cook out of the funds the latter was handling for Mr. Monjar (GA. 1708a). It further appeared that in 1941, subsequent to Mrs. Drew's withdrawal, the National Board, pursuant to directions from the National Council, ordered six thousand costumes at the same price (SA. 159-160, being Def. Ex. 61).

The Relationship of the Defendants to the Club.—Hugh B. Monjar was the Chairman of the Board of Governors from its inception (GA 1643a).

A. J. Cook was a member of the National Board of Governors from 1929 and was its Treasurer from 1933 on (GA. 1743a). In December, 1927, he had contacted Mr. Monjar to find out what could be done to keep alive and how to succeed in continuing the general idea of the Decimo Club (GA. 1774a).

J. F. Jones was also a member of the National Board of Governors from the inception of the Club in 1929 (GA. 1745a), had aided in the organization and management of Key Publishing Company, and made personal loans to Monjar (GA. 1127a).

Clement O. Drew had been active in organization work and was a member of the ten-man Board of Governors elected in 1940, was Chairman of the National Membership Committee, and Second Vice-Chairman of the National Board (GA. 1679a).

Mrs. Josephine T. Drew was employed by the Mantle Club as secretary to Mr. Monjar from November 1, 1933 to September 30, 1935 (GA. 1509a). She, with another, received from Monjar $10,000 for the purpose of setting up the Golden Braid Costume Company. She was President of the Golden Braid Costume Company from 1936 to 1940. She received dividends of $77,600 and salary of $66,000 over that period in which she managed the entire business of the corporation including the supervision of thirty to forty-five employees. In 1940 she disposed of all her stock, resigned from her position as President of that company, and married Mr. Monjar (GA. 1514a). Mrs. Monjar in her affidavit in support of her request for a bill of particulars (GA. 1511-1516, Gov. Ex. 243) declares that she had no knowledge whatever of the source of the funds loaned to her with which she bonught Golden Braid stock; that she, as President of the Costume Company, dealt at arm's length with the National Board (GA. 1514a). The foregoing constitutes the only evidence offered against Mrs. Monjar to sustain the charge of conspiracy of which was found guilty.

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Third Circuit erred in holding:

1. That use of the mails by defendants after completion of the sale of a security is a use of the mails "in the sale" of a security within the meaning of Section 17(a) of the Securities Act of 1933.

2. In failing to hold that a verdict of guilty of conspiracy to violate Section 17(a) of the Securities Act of 1933 and the mail fraud statute must be set aside where there is no evidence that the provisions of the Securities Act would be violated by the purpose of the conspiracy or the means of accomplishing it.

3. In failing to hold that the trial court erred in directing the jury that as a matter of law, the personal loan transactions constituted a sale of securities as the terms "sale" and "security" are defined in the Securities Act of 1933.

4. In holding that confessions by defendants induced and influenced by promises of non-cooperation with the SEC by the Internal Revenue Agent to whom they were made are not thereby rendered incompetent under the Fifth Amendment

5. In holding that after indictment, trial, and verdict for mail fraud statute and Security Act violations and conspiracy to violate those laws, on instructions all limited to allegation and proof of a scheme to defraud by the formation of a club, conviction may, in the absence of evidence of such scheme, nevertheless, be sustained so long as some scheme is shown to have existed at the date of the use of the mails.

6. In holding that evidence of acts in 1934 from which fraudulent intent of defendants in that year was inferred permits of the further and retrospective inference that defendants had such fraudulent purpose at a time five and even seven to ten years earlier.

Reasons for Granting the Writ

The trial of this case consumed a period of 57 days of actual trial. That numerous errors crept into the proceeding is largely attributable to the failure on the part of the Government to determine and disclose in the indictment or by Bill of Particulars, or during the course of the trial, a definite theory for the case.

1. The erroneous construction of the Securities Act by the court below involves a recurring and highly important question of Federal law which should be decided by this Court.—Conflict in principle with a decision of this Court also results from the decision of the Circuit Court of Appeals in this case.

Counts 16-18, 20 and 21 of the indictment on which petitioners were convicted purport to allege violations of Section 17(a) of the Securities Act (15 U. S. C. sec. 77q(a)):

> "It shall be unlawful for any person in the sale of any securities by use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
> * * *
>
> "(1) to employ any device, scheme or artifice to defraud * * *."

The pertinent portions of count 17 (typical of all) allege (A. 76a):

> "the defendants * * * having devised and intended to devise said scheme and artifice to defraud * * * did * * * feloniously employ said scheme and artifice in the sale of a security * * * by the use of the United States Mails, which said use of the United States Mails was as follows:"

Each count then goes on to allege that defendants sent by the mails or by telegraph a letter or telegram addressed to A. J. Cook from one of the other defendants or from a PL or CD agent reporting the results of meetings for the purpose of obtaining PL or CD loans (A. 74a-87a).

To support these allegations the evidence of the Government showed that the letter or telegram described in each of the security counts on which petitioners were convicted was sent merely as a report, by the local PL representative of Mr. Monjar, of the moneys received from individuals to whom he had issued the receipts relied on by the Government as constituting securities.[5] There was no evidence to

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[5] Count 16. Gov't Ex. 211 at GA. 859a.
Count 17. Gov't Ex. 221 at GA. 920a, 927a, indicating bank draft was attached.
Count 18. Gov't Ex. 212 at GA. 860a.
Count 20. Gov't Ex. 77 at GA. 287a; GA. 254a-255a.
Count 21. Gov't Ex. 127 at GA. 601a, 596a.

show that the particular letter or telegram was otherwise related to the sale. There was no evidence to show, and it was not argued, that it was *in furtherance* of the sale.

The petitioners demurred to these counts of the indictment on the ground, among others, that the uses of telegraph or mail "were not uses made in the sale of securities" within the meaning of the Act, nor made in or about the procurement of the sale or disposition of or contract of sale of a security, nor were such uses or communications to or from, or intended for, or expected to be seen or relied upon by, any alleged purchaser of any security or any alleged security (A. 108a).

Again, the petitioners made a motion for a directed verdict at the close of the Government's case (A. 226a) and at the close of the whole case on the ground, among others, that there was no evidence to support the allegations of counts 16 to 22, inclusive, that defendants sold or attempted to sell "any security by the use of" the mails or an instrumentality of interstate commerce within the meaning of 15 U. S. C. sec. 77q(a). (A. 675a-676a, 691a).

The trial court, on demurrer, overruled the contention (A. 117a-118a) and denied the motion for a directed verdict with respect to these counts (R. 10016), except that counts 19 and 22 were withdrawn from the jury (A. 734a). The defendants also submitted, and were refused, their prayer for instruction No. 19 (A. 691a-721a). They were allowed an exception (A. 749a).

The erroneous theory of the trial court in disregarding the plain language of the statute and overruling defendants' motion for a directed verdict appears from its instruction

to the jury that under the Securities Act, sec. 17(a) (A. 773a):

> "It is not necessary for the mails or the instrumentalities of interstate commerce to have effectuated the definite steps which consummate the fraud; *it is sufficient if the mails* or the instrumentalities of interstate commerce *were used as a step in, or in furtherance of,* a device, scheme, or artifice to defraud. * * * The question you must decide is whether the PL and CD loans * * * were made *in connection* with the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails * * *." (Emphasis supplied.)

Petitioners, contending that "in the sale" is at most no broader than "in furtherance of the sale" and certainly does not mean "in furtherance of the fraud," assigned error (Assignments Nos. 1, 4, and 23, A. 764a-765a, 776a).

The Circuit Court of Appeals held (SA. 189.):

> "Knowledge of what happened at those meetings and their tangible results in the form of cash statements and covering bank drafts were necessary to the defendants. That information was supplied by the letters and telegrams which are the source of the security counts. Those letters and telegrams were all sent to Cook, the treasurer of the club, by one or the other of his co-defendants or by a loan agent. *Obviously, they were in furtherance of the sale of the loans.*" (Emphasis supplied.)[6]

In the first place, it is plain that the statute condemns only employment of a fraudulent scheme "in the sale of any securities * * * by the use of the mails" or other

[6] The error in this conclusion as to the sufficiency of the evidence to show that it was in furtherance of the sale of the loans is aggravated by the fact that the case was submitted to the jury on a much less strict rule.

any securities * * * by the use of the mails" or other means of interstate transportation or communication. Certainly the statute does not condemn employment of a fraudulent scheme in the use of the mails. Neither does it merely duplicate the mail fraud statute to punish use of the mails in furtherance of a scheme to defraud. The language is rather clear. It requires no extraordinary perspicuity to perceive that if, as part of a fraudulent scheme, one uses the mails "in the sale of any securities," he is subject to punishment. But there is no hint in the language of this section that one who merely obtains money by a fraudulent scheme or that one who merely defrauds by sale of securities is punished. These acts, standing alone, are both beyond federal jurisdiction. The statute, recognizing constitutional inhibitions, requires as an additional element that the mails or other means of interstate communication be used.

But the Act goes further and particularizes that the mails or other communication means must be used, not merely in furtherance of a fraudulent scheme but used specifically "in the sale of securities." The mail fraud statute was narrowly confined to use of the *mails* and broadly applied if such use was in "furtherance" of the scheme (18 U. S. C. sec. 338). On the other hand, the Securities Act, sec. 17a (15 U. S. C. sec. 77q(a)) is broad in its embrace of the use of the mails and other means of interstate communication and transportation as well but narrow in its requirement that such we be "in the sale of securities," although fraud be employed. As stated by Judge Yankwich in *United States* v. *Williams*, 1 S. E. C. Jud. Dec. 51, 52:

> "it is quite plain from the wording of the section [15 U. S. C. sec. 77q(a)] that use of the mails must be a means for selling the securities. * * * So we have the artifice to defraud, the obtaining of property under false pretenses, as one element; and the other, *the use of the mails for the purpose of sale of the security.*"

Again, in *United States* v. *Carter & Co.*, 56 F. Supp. 311 (W. D. Ky., 1944), the court held (p. 314):

> "In proceeding under Section 77q of Title 15 U. S. C. A. it is necessary that the Government allege the existence of a scheme or artifice to defraud and the use of the mails to carry out that scheme, and *then to allege in addition thereto that the acts occurred in the sale of a security.*" (Emphasis supplied.)

The lower courts, particularly the trial court, plainly treated the Securities Act provision as if it were the equivalent of the mail fraud statute. This judicial enlargement by the District Court by interpretation of a criminal statute is at war with the fundamental concept of the common law that a crime must be defined with appropriate definiteness. *Pierce* v. *United States*, 314 U. S. 306, 311. As stated in *Connally* v. *General Construction Company*, 269 U. S. 385, 391, and reaffirmed in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Under the trial court's instruction, it would be sufficient under the Securities Act, section 17, to allege and prove a scheme to defraud related to sale of securities and the use of the mails merely in furtherance of the scheme. The Circuit Court of Appeals, apparently recognizing the trial

court's error, concludes that the letters and telegrams "were in furtherance of the sale of the loans."

Even if we concede that the correct rule is that, as the Circuit Court of Appeals apparently recognizes, use of mails or telegraph "in furtherance" of sales is sufficient to constitute use "in the sale of any securities" within the meaning of the statute, it is plain that the defendants have been deprived of a trial by jury under the security counts of the indictment. For the trial court erroneously instructed, and permitted the jury to find, that the defendants were guilty if the defendants merely used the mails in the furtherance of a scheme to defraud. Plainly, the Circuit Court of Appeals may not speculate as to what the jury would have found, had it been properly instructed.

Conflict in principle with the decision of this Court in *Kann* v. *United States*, 323 U. S. 88, is plain. There the question was whether the use of the mails was "for the purpose of executing such scheme" within the meaning of the mail fraud statute (18 U. S. C. sec. 338). Here the question is whether the use of the mails was "in the sale of any securities." There the question was whether the use of the mails was in furtherance of the fraudulent scheme. Here the question is whether the use of the mails was in furtherance of the sale. In that case this Court held that the scheme in each of the transactions involved "had reached fruition" before the use of the mails occurred. Distinguishing cases where the mails were used prior to and as one step toward the obtaining of the fruits of the fraud or as a means of concealment, this Court said (p. 95):

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is an integral part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

It is submitted that this language is properly to be paraphrased with respect to the Securities Act:

> "Section 17(a) of the Securities Act does not purport to reach all frauds, but only those in which the use of the mails is an integral part of the consummation of the sale employing the fraud, leaving all other cases to be dealt with by appropriate state law."

It is submitted that the *Kann* case makes clear the desirability of similarly calling attention to the limitations in scope of the Securities Act.

None of the cases cited by the court below support its decision. In *Kopald-Quinn & Co.* v. *United States*, 101 F. 2d 628, cert. denied 307 U. S. 628, the contention was that the evidence under 15 U. S. C. sec. 77q(a) must show (1) a scheme to effect sales and (2) actual sales of securities by mail. Obviously this was too narrow in view of the definition of "sale" contained in 15 U. S. C. sec. 77b(3) and was properly overruled. In *Pace* v. *United States*, 94 F. 2d 591, allegations as to a letter expressing thanks for orders for stock given salesmen were held, under 15 U. S. C. sec. 77q(a), sufficient to withstand demurrer. But such a communication might well be regarded as part of the closing of the sale, as in the course of it, or so closely related thereto that, being directed to the vendee, the mailings were properly to be regarded, within the meaning of the statute, as a use of the mails "in the sale" of securities. In *Landay* v. *United States*, 108 F. 2d 698 (C. C. A. 6), the opinion states (p. 701) what, under the most narrow construction of the statute, must properly be regarded as fully adequate facts said to have been alleged in four counts under 15 U. S. C. sec. 77q(a) (1) and in four counts under 15 U. S. C. sec. 77q(a) (2). The Government apparently exhibited to the Circuit Court of Appeals below a copy of one count in that case which was based on a letter ac-

knowledging receipt of a check and an order to purchase. While this does not appear from the reported opinion, it should be noted that aside from the fact that, at the time of such mailing, the sale was presumptively still to be consummated by actual delivery, it is even more important to note that the sentence was general and therefore sustainable on the other nine counts on which conviction was had. *Pierce* v. *United States*, 252 U. S. 239, 252-253; *Evans* v. *United States* (No. 2), 153 U. S. 608.

It seems plain that the several circuit courts of appeals have by their broad language in their interpretation of Section 17(a) of the Securities Act indicated a developing tendency, not only to assimilate, but to identify, the offenses under the mail fraud statute and the offense under Section 17 of the Securities Act. The pernicious effect of such broad generalization is best reflected by the plainly erroneous instruction of the trial court in this case. Clarification by this Court of the elements of the offense under Section 17(a) of the Securities Act will obviously promote expeditious and correct disposition of the same question which is bound frequently to recur until authoritatively settled.

As a corollary to the insufficiency of the evidence to sustain conviction on the substantive counts under the Securities Act, the verdict and judgment under count 25 of the indictment must also be set aside.—In this case count 25 of the indictment charged the defendants with conspiracy under 18 U. S. C. sec. 88 to commit wilful violations of the mail fraud statute and Section 17 of the Securities Act (A. 92a-95a). As shown above, under Point 1, the evidence is inadequate as a matter of law to show any violation of Section 17 of the Securities Act, either as alleged in counts 16-22, inclusive, of the indictment or otherwise. Admittedly, the only evidence introduced to show the existence of a combination contemplating acts in violation of Section

17 of the Securities Act consisted of the acts proved by the Government and by it relied upon to sustain convictions on the substantive counts for violation of the same Section. Since, as shown above, those acts do not constitute violation of Section 17 of the Securities Act, it, therefore, necessarily results that there was no evidence upon which a jury could rightly find under count 25 the existence of a conspiracy to violate Section 17 of the Securities Act, as alleged in count 25.[7]

To save the point, the defendants moved to withdraw from the jury all consideration of the evidence offered to sustain the allegation that the defendants conspired to violate Section 77q(a) of Title 15 of the United States Code (A. 686a). This motion was overruled and exception noted (A. 750a). Error therein was properly assigned (A. 784a).

It is well established that where a conspiracy count alleges combination to commit several substantive offenses, and where the evidence is insufficient as a matter of law to show combination as to one or more of such offenses, then a verdict of guilty thereon cannot be sustained since the jury may have reached its verdict in reliance solely on the evidence inadequate as a matter of law to show any fraud. In *United States* v. *Groves*, 122 F. 2d 87 (C. C. A. 2) a number of defendants were indicted for using the mails to defraud and for conspiracy to do so. As stated on page 89:

> "Each count of the indictment set forth three separate frauds alleged to have been practiced on G.I.C. pursuant to the scheme."

The evidence indicated fraud in the purchase of minority stock and its resale to a corporation, and two frauds in the

[7] It is to be noted that this is the only count on which Josephine T. Monjar was found guilty (A. 8a) and sentenced (A. 11a).

procurement of two commissions on account of the sale of securities of the corporation. Referring to one of the defendants, one George Groves, the Court recognized that there was some evidence of his participation in the minority stockholder fraud, but added (page 91):

> "But there was no further evidence at all of his connection with the procurement of the two fraudulent commissions, and under the circumstances we feel that a jury would not be justified in finding that he participated in either of them. But if it could not find that he participated in both, his conviction must be reversed for it was allowed, over objection, to consider together his guilt in respect of each of the three frauds alleged, and hence each must be proven. United States v. Smith, 2 Cir. 112 F. 2d 83. See United States v. Koch, 2 Cir., 113 F. 2d 982, 984."

The Second Circuit has long recognized that where the defendant under a conspiracy indictment properly moves to withdraw from the consideration of the jury for insufficiency of the evidence any of a plurality of offenses alleged to have been the objective of the conspiracy, and the court improperly overrules such motion and submits generally to the jury the issue of a conspiracy to commit that offense together with issues of conspiracy to commit other offenses, then an adverse verdict cannot be sustained on the theory that it was based upon evidence adequate to support a finding of the other frauds. *United States* v. *Mascuch*, 111 F. 2d 602, 603 (C. C. A. 2, 1940); *United States* v. *Smith*, 112 F. 2d 83, 86 (C. C. A. 2); *United States* v. *Koch*, 113 F. 2d 982, 983-984 (C. C. A. 2).

It is therefore clear that if, as contended above (pp. 22-30), the use of the mails by defendants may not properly be deemed to have been "in the sale of any securities," then the convictions under count 25 must be set aside.

2. **The trial court plainly invaded the province of the jury and deprived petitioners of their right to a jury trial in instructing as a matter of law that the personal loans constituted sale of securities within the meaning of the Securities Act.**—The opinion of the Circuit Court holds there were no errors in the trial (SA. 198). In so holding, it has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision.

Here the trial court gave the binding instruction to the jury that a security had been sold by the defendants. The defendants throughout the trial had contended that the loan receipt, relied on by the Government in counts 16-22, inclusive, as being a security (i. e. an evidence of indebtedness or an investment contract (A. 214a)) was not a security within the meaning of the Securities Act (R. 1581, 1869-1870, 2340, A. 108a-109a; A. 675a, par. 16; A. 691a, prayer 19).

But the court instructed (A. 733a):

> "The question you must decide is whether the PL and CD loans, constituting a sale of securities as the terms 'sale' and 'security' are defined in the Act, were made in connection with the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails."[8]

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[8] This was followed with the further statement by the court (A. 733a-734a):

> "You must find, in order to convict under the counts, that the defendants received money from these loans and that the victims were told that the money was to be used I quote, 'to organize business concerns which would operate for the benefit of the persons making the loans.' And you must also find that the money was paid over by the members with the expectation that the return to be obtained would give to such 'worthy men' financial independence."

This was plainly only to caution that the third element, fraud, must be found by the jury before they could convict of the crime under the security counts.

The constitutional right to jury trial of course requires that decision of issues of fact be fairly left to the jury. *United States* v. *Murdock*, 290 U. S. 389, 394; *Patton* v. *United States*, 281 U. S. 276, 288. The question whether the personal loans here involved constituted securities within the meaning of the statute is plainly a mixed question of law and fact which, under proper instructions as to the law, should have been left to the jury for final determination. In *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, it was held (p. 351):

> "Instruments may be included within any of these definitions [in the Securities Act] if on their face they answer to the name or description."

But this Court further held (p. 355) that where proof that documents being sold were securities under the Act requires going outside the instrument itself to show the character given it by the terms of the offer and by the economic inducements, then such proof, in a criminal case must "meet the stricter requirement of *satisfying the jury* beyond a reasonable doubt" (emphasis supplied).

Here the trial court in overruling a demurrer, held that the giving of what was apparently a mere receipt for money was a sale of an evidence of indebtedness or an investment contract. And the Government plainly relied on the testimony of oral representation made in inducing the loan as showing that the transactions constituted an investment contract within the meaning of the statute. The question whether this was a security—either evidence of indebtedness or an investment contract—and hence within the operation of the Securities Act was thus plainly a question of fact for the jury under the decision in the *Joiner* case. There was a large amount of conflicting evidence on the question of what representations had been made. The taking of the question from the jury deprived petitioners of

their constitutional right to a fair trial on an obviously vital issue. *United States* v. *Murdock*, 290 U. S. 389, 394; *Quercia* v. *United States*, 289 U. S. 466; *Patton* v. *United States*, 281 U. S. 276, 288.

No exception was taken to the instruction at the trial but the error is so obvious and so plainly prejudicial that this Court may and should nevertheless of its own motion note and correct it. *United States* v. *Atkinson*, 297 U. S. 157, 160; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 239.

3. **The decision of the court below holding admissible confessions of the defendants induced by promises of an internal revenue agent is in conflict with decisions of this Court.**—The Government offered in evidence Exhibit 254 (GA. 1638a), being a memorandum from the defendant Monjar to the defendant Drew, dated February, 1934, in which Monjar first suggested the procurement of the personal loans, and as well Gov. Exhibits 255 (GA. 1642a), 256 (GA. 1670a), 275 (GA. 1678a), 258 (GA. 1704a), 259 (GA. 1715a), 260 (GA. 1726a), 261 (GA. 1736a), and 262 (GA. 1742a), the latter being transcripts of statements of the defendants Monjar, Drew, Josephine T. Monjar, Willard, Maddams, and Cook, made before one Cordes, Special Agent of the United States Internal Revenue Bureau, in April, 1942.

The agent who obtained these statements and was called to identify these exhibits testified that in his conference with the attorney for the Mantle Club and Mr. Monjar personally on March 2, 1942, he told them "that in return for the complete cooperation of the Club officials, that I would not cooperate in the S. E. C. investigation then in progress" (GA. 611a). Upon statement by the United States Attorney as to proposed proof by this witness, counsel for the defendants objected that it was clearly a violation of

the understanding (GA. 613a) and that the statements constituted confessions and were not admissible under *Bram* v. *United States*, 168 U. S. 532 (R. 2973-2974). Because the major portion of the argument of the question had been off the record, when the exhibits were offered in evidence (R. 5023-5026, GA. 963a-965a) counsel for defendants formally stated their objections for the record, and exception was noted (R. 5028). His three contentions were (1) the Treasury Department had not unqualifiedly waived the right to refrain from exhibiting this information; (2) "the obtaining of information upon an assurance of that kind, and the later admission of such evidence into evidence was a violation of the Fifth Amendment to the Constitution of the United States"; (3) the obtaining of evidence in this way was a violation of law (R. 5026-5028).

After argument the trial court entered its opinion March 29, 1943. It held that the exhibits were admissible, relying principally on *Gibson* v. *United States*, 31 F. 2d 19, cert. denied 279 U. S. 866, and *Olmstead* v. *United States*, 277 U. S. 438. Referring to his "unqualified approval of the dissenting opinions" in the latter case, the trial judge nevertheless held that he was without power to exercise his discretion to exclude the evidence (A. 216a-220a). The highly prejudicial nature and effect of the exhibits involved is unquestioned. The Circuit Court of Appeals, while it did not at first notice the point (SA. 185-198), after the filing of the petition for rehearing, amended its opinion to include a holding that no Treasury regulation prohibits the testimony as given, that the promise not to cooperate with the Securities and Exchange Commission investigation had been kept, and finally that the Fifth Amendment was not infringed because the proof was overwhelming that the statements were voluntary (SA. 228-229).

The statements obtained from Monjar and the statements obtained from the other defendants by Government

witness Cordes all constituted confessions of the truth of some of the essential parts of the guilty facts charged in the indictment. They were induced by the promise Revenue Agent Cordes made to the attorney for the Mantle Club and Monjar personally that "in return for the complete cooperation of the Club officials, that I would not cooperate in the S. E. C. investigation then in progress." This promise of protection from the Securities and Exchange Commission was clearly offered as an inducement to obtain the statements of the defendants.

Under the rule stated in *Bram* v. *United States*, 168 U. S. 532, the statements made by the defendants, if they amount to a "confession," were clearly inadmissible because obtained as result of an inducement offered by the Government officer and calculated to operate upon the minds of the defendants. The rule is as there stated (pp. 542-543):

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books.
>
> "In 3 Russell on Crimes, (6th ed.) 478, it is stated as follows:
>
> "'But a confession in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises*, however slight, nor by the exertion of any improper influence * * *. A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the

> prisoner, and therefore excludes the declaration if any degree of influence has been exerted.'" (Emphasis supplied.)

As held in *Wilson* v. *United States*, 162 U. S. 613, 623:

> "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort."

In the court below the Government rested its contention on the ground that the statements were merely the acknowledgment of subordinate facts. This argument was obviously without merit. While it is true that a mere admission of a subordinate fact or subordinate facts from which, with other evidence, guilt might be inferred, does not rise to the dignity of a confession, it is clear that an acknowledgment in express words by the accused in a criminal case of the truth of the essential facts of the crime charged or of the facts constituting some essential part of the crime amounts to a confession accompanied by the safeguards against self-crimination. Indeed, in *Wilson* v. *United States*, 162 U. S. 613, the court went so far as to hold (pp. 621-622) that although the defendant's——

> "answers to the questions did not constitute a confession of guilt, yet he thereby made disclosures which furnished the basis of attack, and whose admissibility may be properly passed on in the light of rules applicable to confessions. Of course, although verbal admissions must be received with caution, though free, deliberate and voluntary, confessions of guilt are entitled to great weight. But they are inadmissible if made under any threat, promise, or encouragement of any hope or favor."

And in *Bram* v. *United States*, 168 U. S. 532, the court quoted with approval (p. 541):

> "The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: 'The rule

> excludes not only direct confessions, but *any other declaration tending to implicate the prisoner in the crime charged* even though, in terms, it is an accusation of another, or a refusal to confess.'" (Emphasis supplied.)

In *Ercoli* v. *United States*, 131 F. 2d 354 (App. D. C., 1942), the court cited with approval 3 *Wigmore Evidence*, 3d ed. 1940 sec. 821:

> "What is a confession? Denials, guilty conduct, and self-contradictions distinguished. A confession is an *acknowledgment* in express words, by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part of it.* It is to this class of statements only that the present principle of exclusion applies. In this sense therefore there are in particular three things which fall without the meaning of the term 'confession' and are thus not affected in any way by the present rules, namely, (1) guilty conduct, (2) exculpatory statements, and (3) acknowledgments of subordinate facts colorless with reference to actual guilt." (Emphasis supplied.)

In the amendment of its opinion, by order entered February 26, 1945, the court below failed to meet this point. It merely said (SA. 229):

> "As to the constitutional point, there is overwhelming proof in the record that the statements were voluntary. We have also examined the trial court's admonition to the jury when the statements were received into evidence. There was no objection to this at the time, nor was there any request later of the Court to charge specifically concerning them. We find no material error by the Court in connection with the statements in question."

The opinion of the court below misses entirely the point that a confession, even if voluntary, may not, under the Fifth Amendment, be offered in evidence if shown to have been induced by promises.

Proper exception was taken to admission of the confessions.—Plainly at war with the record is the court's statement SA. 229 that there was no objection at the time the statements were received into evidence. The offer was made (R. 5023-5026), objections were stated (R. 5026-5028), and the court ruled (R. 5028):

> "Well, for the reasons set forth in the memorandum opinion which I filed several days ago [A. 216a-220a], I overrule the objection and let an exception be noted."

The statements obtained by promises of protection against S. E. C. investigations were confessions in that they constituted admissions of essential elements of the crimes charged.—This statement and the discussion thereof is, of course, no admission that the evidence was sufficient as a matter of law to prove any crime under the indictment. That the statements of Monjar (Gov. Exs. 255 and 256, GA. 1642a and 1670a) constituted admissions of essential elements of the crime charged is apparent from a mere reading of them. The first statement was relied upon because, among other things, it contained the identification by Monjar of Ex. 254 as his (GA. 1655a). This memorandum includes directions to make solicited lenders understand that Monjar would "do all in my power to see that eventually they will receive great benefits from their assistance financially at this time" (GA. 1639a). This memorandum (apparently sent to Drew (GA. 1655a-1656a)) thus displays the directions of Monjar as to the mode and basis for negotiating the loans. Admissions of its authorship by Monjar plainly constitute admission of an essential element of the crime charged in that it shows Monjar actively directed the making of the alleged fraudulent misrepresentations as to returns on the loans. Indeed, as Monjar himself noted (GA. 1657a), and as is apparent

from the course of questions and answers (GA. 1657a-1659a, 1660a-1662a, 1665a-1667a), the questions by the internal revenue agent give the statement but little significance on an income tax investigation and seem patently directed along the lines of an investigation preliminary to this prosecution.

The statements by the other defendants in Gov't Exs. 257-262, inclusive (GA. 1678a-1742a) thus obtained by the inducing promise of the revenue agent equally plainly admitted essential elements of the charge of use of the mails to defraud and of sale by use of the mails employing a scheme to defraud. They also supplied evidence of the purpose to violate the mail fraud statute and the Securities Act, which were referred to as the objectives of the conspiracy charged in count 25.

The holding of the Circuit Court of Appeals that there was no material error in admitting these statements is obviously in conflict with the decisions of this Court cited above, and with that of the Circuit Court of Appeals for the Eighth Circuit (*Sorenson* v. *United States*, 143 Fed. 820, 823) and with circuit court decisions (*United States* v. *Pocklington*, Fed. Cas. No. 16,060; *United States* v. *Pumphrey's*, Fed. Cas. No. 16,097). The conflict should at least be resolved.

4. **The evidence was insufficient as a matter of law to show the existence of the scheme charged in the indictment and constituting the basic theory on which the case was tried and submitted to the jury.**—In approving verdicts reached only by a retrospective presumption that from acts evidencing fraudulent intent it may be inferred that a similar fraudulent intent existed five years earlier the decision violates basic rules of reason and conflicts with decisions of this Court.

The indictment charged that the scheme to defraud included the organization of the Mantle Club. It alleged (A. 20a-21a, 31a):

> "1. It was part of the scheme to defraud that the defendants and their associates did, during the year 1928, cause to be organized, and they did so organize, an unincorporated association to be known, and it was known, as the Mantle Club; * * *
>
> * * * * * * *
>
> "19. It was further part of said scheme to defraud that the defendants would cause and direct the representatives of the National Board of Governors of the Mantle Club, in connection with the solicitation for the personal loans to Hugh B. Monjar, one of the defendants, falsely to represent to such persons:
>
> * * * * * * *
>
> "(c) That the persons making the loans had nothing to do with membership in the Mantle Club and that it was an activity separate and apart from the Mantle Club, whereas in truth and in fact, as the defendants then and there well knew, *the said Mantle Club had been organized and set up by the defendants* as one of the purposes and objects, *so that the said Hugh B. Monjar, one of the defendants, could and would obtain money by means of personal loans* from persons joining the said Mantle Club; * * *" (Emphasis supplied.)

The Government, in argument on petitioners' demurrer, contended:

> "The next ground of demurrer is that the scheme or artifice is not sufficiently accurate or particular.
>
> "The scheme as alleged in the first count of the indictment, and as realleged by reference in the other counts, shows:
>
> "(a) That it was devised in 1928 and has continued since that date." (Exhibit A to Bill of Exceptions, referred to on page 4, Item 5 of the Bill of Exceptions.)

On argument of motion of the defendants for a directed verdict, at the close of the Government's case, Mr. Kelly, counsel for the Government, stated (R. 5766):

> "What does that indictment charge? This indictment charges that this was a scheme to defraud, devised in 1928. We charge that as part of the scheme to defraud, the defendants caused the organization of the Mantle Club."

During the argument on the motion of defendants for a directed verdict the following colloquy of the Court and Government counsel occurred (SA. 41):

> "The Court: In other words, you say the 51 paragraphs in the indictment are repetitions of the various component parts of the grand scheme.
>
> "Mr. Lynch: That is right, sir. Your Honor has it."

In the course of the same argument, Mr. Kelly, counsel for the Government, also said (SA. 42):

> "But, after the Senator had cross-examined Mr. Oberholtz at some length, he asked him substantially the same question—*did he believe that the Mantle Club had been set up as a scheme to defraud?* And Mr. Oberholtz' reply struck me quite forcibly at the time because he said, 'Senator, I don't see how you could come to any other conclusion,' and I think that is true, as the Court please." (Emphasis supplied.)[9]
>
> "In the light of this testimony—certainly at this state of the testimony, in the light of this unexplained testimony, I do not see how the Court could come to any other conclusion other than the conclusion which had been reached by Mr. Oberholtz. Now, with regard to Mr. Oberholtz, was his testimony worthy of belief? I think it was."

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[9] While not directly involved in the point under discussion, it should be noted that this testimony for the Government was repudiated by the same witness on cross-examination (A. 433a-434a).

He amplified the same view (SA. 41):

> "Especially is that true when you take into consideration as you must—and here I say the defense tried to get off the track—you have to take into consideration not just the PL's alone, not just the Golden Braid situation alone, not only the Key Publishing Company situation alone, but, if the Court please, *this is all one cohesive conspiracy, and you have to take it all together.*" (Emphasis supplied.)

As a consequence, in instructing the jury, the Court charged (A. 723a):

> "The scheme to defraud alleged in the indictments in these cases is substantially as follows: The defendants planned, prior to the creation of the Mantle Club in 1928, *to create that Club as a vehicle or instrument to be used by the defendants in the perpetration of a fraud or frauds* upon its prospective members after the organization of said Club.
>
> "In order to find a verdict of guilty against any defendant under any count in these indictments, *it is necessary for the jury* to find beyond a reasonable doubt *that the scheme to defraud was devised prior to the organization of the Mantle Club*, which occurred in 1928." (Emphasis supplied.)

It was and is petitioners' contention that there was utterly no evidence to show that the organization of the Mantle Club was part of any fraudulent scheme, much less part of the scheme alleged in this indictment (see Assignment of Error No. 4 (A. 765a)).

The Government sought to avoid the point by treating the contention as being merely that the evidence had failed to prove the date of the devising of the scheme alleged in the indictment; to this it answered that this does not go to the essence of the offense (*Armstrong* v. *United States*, 65 F. 2d 853, 857 (C. C. A. 10)) and that, therefore, the

charge of the Court imposed an improper burden on the Government. As the second ground for opposing the contention, the Government relied upon testimony which, if believed, was sufficient only to show that the Mantle Club was formed for the same general purposes as motivated the formation and continuation of the Decimo Club from which Mr. Monjar was ousted in October, 1927.[10] The Circuit Court of Appeals accepted and adopted both of these arguments as sufficient (SA. 193-196). Failing to distinguish between the irrelevant question as to when a scheme is devised and the question here whether there was a scheme to form the Mantle Club as a vehicle for fraud,[11] the Court said SA. 194):

> "The actual date of the organization of the Mantle Club was not a vital part of the Government's case. The fraudulent scheme as charged and proved was not simply the formation of the Club."

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[10] The Government made, but the Circuit Court of Appeals apparently found no merit in, the assertion that fraudulent purpose in the formation of the Club appeared because:

(1) In 1928 Monjar and others actively promoted the H. B. Monjar Co., Inc., which promotion was contemporaneous with the Holaire Corporation, and also the Business Executives Association. A group of those interested in the H. B. Monjar Company were invited to a meeting at Rumford Hall, where they were told that by lending Monjar the sum of $100.00 in connection with a house-building enterprise, they might expect returns (GA. 1196-1205), which the Government attorney suggested were estimated at $50,000.00, but the witness could not recall.

(2) Witness Lewellyn testified that after investigation of the H. B. Monjar Company, Inc. by the Attorney General of New York in 1929, he loaned $200.00 to Mr. Monjar and accepted in repayment two shares of stock of the H. B. Monjar Company. The absurdity of suggesting that these items evidenced fraud was apparently obvious to the Circuit Court of Appeals.

[11] The reference to 1928 is important only as a temporal means of identifying the act, the formation of the Mantle Club, which is alleged to be an integral part of the scheme to defraud with which the defendants are charged.

This, of course, overlooks and ignores the fact that the fraudulent scheme charged, as urged by the Government, interpreted by the Court, and necessarily required to be proved, was the scheme to form the club as a vehicle for defrauding its future members. In adopting and expanding the Government's second ground the opinion of the Circuit Court of Appeals exhibits a rather transparent form of fallacious reasoning. It first alludes to the evidence that the Mantle Club was formed to promote and operate an organization similar to the Decimo Club, and to carry out the purposes with respect thereto which Monjar "always had had in mind." It then irrationally jumps to the alleged fraudulent occurrences in 1934, and concludes from these that "the unchanging purposes of Monjar as shown by the end results, were to defraud the members of the Mantle Club to the benefit of himself and his associates." No more transparent instance of irrational conclusion could well be imagined. Apparently the Court recognizes that the events occurring in 1934 could not rightly be said to show a fraudulent purpose in 1928. There is obviously less basis for contending that the occurrences in 1934 showed a fraudulent purpose in 1924-1927 in the formation and conduct of the Decimo Club. It is therefore absurd to reason therefrom that because the purposes of the Mantle Club formation were the same as those underlying the Decimo Club, the Mantle Club formation must therefore be deemed to have had a fraudulent purpose. The *non sequitur* in each chain of reasoning is exactly the same and is not cured by the introduction of the intermediate link referring back to the Decimo Club. That link adds no weight to the reasoning because there is no evidence that the Decimo Club was fraudulent in purpose, and the opinion of the Court does not even purport that there was.

Thus the sufficiency of the evidence to show the existence of the scheme alleged in the indictment is sustained by the Circuit Court of Appeals only by the invocation of the retrospective and violent inference that, because of fraudulent acts in 1934, it is to be inferred that the defendants planned to commit fraudulent acts when they formed the club five years previously.

It is submitted that where the inference is so strained as to have no foundation in common experience, and has no rational connection with the fact proved, it is so arbitrary as to make a verdict based thereon non-supportable as a matter of law. In holding to the contrary, the decision of the court below is at war with numerous decisions of this Court and of the circuit courts of appeals. *Tot* v. *United States*, 319 U. S. 463, 467; *Baumgartner* v. *United States*, 322 U. S. 665, 676, 677. In permitting the jury to infer from circumstances occurring in 1934 the existence of a fraudulent intent in 1928, the decision below plainly conflicts in principle with the decision in *Parlton* v. *United States*, 75 F. 2d 772, 776 (App. D. C.):

> "The law requires, particularly in a criminal case, an open and visible connection between the principle or evidentiary facts and the deductions for them, and does not permit a decision to be made on remote inferences. Manning v. Insurance Company, 100 U. S. 693, 698. It has been frequently said that proof of the existence of a given condition raises no presumption of its previous existence."

It is also in conflict with the decision in *W. F. Corbin & Co.* v. *United States*, 181 Fed. 296, 304-305 (C. C. A. 6). As stated in *1 Wharton, Criminal Evidence* (11th Ed.), p. 161:

> "A presumption of continuity is not retroactive, but is prospective only"

In *Underhill, Criminal Evidence* (4th Ed.) sec. 45, p. 59, the rule is stated:

> "A status shown to have existed once is presumed to continue until the contrary is shown, but such presumption is not retroactive."

As the fraudulent purpose of the defendants in this case was the design or intention in the minds of the accused, it must necessarily be ascertained by means of inferences from the facts and circumstances developed by the proof. As stated in *Manning* v. *Insurance Co.*, 100 U. S. 693, 698:

> "The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

And as held in *United States* v. *Ross*, 92 U. S. 281, 284:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves be presumed."

The Circuit Court of Appeals apparently recognized this rule but, by circuity of illogical reasoning, obscured its irrational process to arrive at the same erroneous result.

In the absence of evidence from which inferences properly may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculation, or suspicions as to intention not disclosed by any visible or tangible act, expression, or circumstance. Where, as here, the evidence of the crime consists solely of circumstantial facts, the evidence relied upon must exclude every hypothesis other than that of guilt. *Hart* v. *United States*, 84 F. 2d 799. *Union Pacific Construction Co.* v. *United States*, 173 Fed. 740 (C. C. A. 8). And, as held in *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, "A rebuttable inference of fact must necessarily yield to credible evidence of the ac-

tual occurrence." As held in *McDonald* v. *United States*, 9 F. 2d 506:

> "While it is a fundamental rule that men are presumed to intend the natural consequences of their acts, yet this presumption cannot prevail in the presence of positive proof of a specific intent different from that required by the statute. When such evidence is present, it devolves upon the Government to present affirmative evidence of the existence of the required unlawful intent."

Here there was no witness who stated that there was any fraud in connection with the organization of the Mantle Club. Fifteen witnesses, seven for the defense and eight for the Government, testified to the effect that there was no fraud in connection with the organization of the Mantle Club.[12]

Plainly, the highly attenuated—if indeed it is not preposterous—retrospective inference upon which the Government in the court below so heavily relied must disappear in the light of the uncontradicted and direct evidence of the

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[12] See testimony of witnesses for the defense:

Gottshall	(A. 519a-541a)
Davis	(A. 559a-569a)
Sidore	(A. 542a-558a)
Helenius	(A. 570a-571a)
Herder	(A. 572a-584a)
J. F. Jones	(A. 443a-485a)
Lewellyn	(A. 486a-518a)

and for the Government:

M. S. Apgar	(A. 411a-428a)
F. A. Muller	(A. 395a-410a)
Johnson	(A. 429a-431a)
Baird	(A. 435a-436a)
Dufford	(A. 439a-441a)
Oberholtz	(A. 432a-434a)
Cooper	(A. 437a-438a)
Royer	(A. 442a-443a)

numerous witnesses for both sides. The precedents are clear, and their correctness cannot reasonably be questioned. The decision of the court below is therefore obviously without support in the law.

Because the indictment alleged, and the case was tried on the theory of, only one comprehensive scheme with the formation of the Mantle Club as a fraudulent part thereof, the verdicts cannot be sustained on the theory that the evidence of some other scheme or schemes lurks in the record.—It is axiomatic that because a defendant is entitled to fair notice of the crime with which he is charged, evidence of a fraudulent scheme other than that charged cannot sustain a verdict. *Gammon* v. *United States,* 12 F. 2d 226, 228 (C. C. A. 2); *Rude* v. *United States,* 74 F. 2d 673, 676 (C. C. A. 10); *Brown* v. *United States,* 143 Fed. 219, 220 (C. C. A. 8); *Beck* v. *United States,* 145 Fed. 625, 626 (C. C. A. 2); *United States* v. *Corlin,* 44 F. Supp. 940, 945 (S. D. Calif., 1942). And where, as here, the jury was expressly charged that it could convict only if it found that the scheme to defraud was devised prior to the organization of the Mantle Club (A. 723a), the verdicts cannot be sustained on some subsidiary theory of guilt of another scheme or other schemes that might later have come into existence when the Club was expanded and personal loans solicited, or when some of the defendants became officers of the Key Publishing Company and sold the Key Magazine and Code, or upon the organization of the Golden Braid Costume Company and the sale by it of costumes to the National Board, or when the various business corporations were set up, or upon the payment of large salaries to officers of the Mantle Club and their associates, or with the organization and the operation of the Independence Club. None of these separate subordinate theories except that as to the personal loans commencing in 1934 was even developed in the hearing and defendants were

not tried for that; it was so far from being submitted to the jury as a theory of guilt that the court instructed the jury that it must find a scheme devised prior to formation of the Mantle Club in 1928. *Van Tress* v. *United States*, 292 Fed. 513, 521 (C. C. A. 6, 1923).

To uphold conviction on the theory of some subsidiary fraudulent scheme would be highly prejudicial.—The trial court took the view that every activity of the Club throughout the years was evidence which it could not exclude. It was this allegation which gave to the Government a wide field, and it was this theory of the case which permitted the Government to produce evidence of the large amount of income derived from the numerous activities in connection with the Club which were not in themselves in any way shown to be fraudulent. It was this theory of the Government which prevented the sustaining of the demurrer, the Government contending that all the transactions of the alleged scheme were the result of the original fraudulent scheme to organize the Mantle Club. Prejudice to the defendants resulting from this theory is exemplified by the evidence of the purchases of the back numbers of the Key magazine by the National Board. There was no dispute as to this. While there was no allegation in the indictment relating to the transaction, it was emphasized by the Government as important to show the scheme to defraud. It may well have been that it was upon this transaction that the jury based its verdict. Yet had the theory or theories of lesser or other frauds been even hinted at by the Government, it is plain that the demurrer would have to have been sustained, and in any event evidence as to activities involving no fraud *per se* would have been withdrawn from the jury.

It seems plain that the Circuit Court of Appeals erred in suggesting that it is now open to speculate that the jury's verdict was founded upon some scheme other than

that upon which the case was tried pursuant to the charge in the indictment and the reiterated theory of the Government and the charge of the trial court.

That defendants suffered prejudice from trial and conviction on one theory and justification of the verdict on another, is apparent. After demurrer had been overruled and particulars denied on the theory advanced by the Government and adopted by the Court, and after introduction of a vast amount of evidence admissible only under that theory, and after the same theory had been charged to the jury and conviction of the crime specified under that theory, and after sentence of the defendants accordingly, the Court of Appeals has now held that that theory was not required to be established by the evidence. It results that no one can know for what offense the jury is assumed to have convicted the defendants, nor whether the offense on which they were convicted was sustained by sufficient evidence; neither can it be known whether the sentence would have been as great had the trial court been aware that the defendants were guilty not of the crime charged but of some unspecified different crime which the Circuit Court of Appeals has thus far neglected to disclose. Therefore, also, the right of the defendants to plead former jeopardy to a charge of any offense included in the allegations of the indictment is questionable. Likewise, if the jury is assumed to have convicted the defendants of fraud in any particular transaction, Point 1 (pp. 30-32) hereof establishes that there was error in leaving before the jury evidence of other transactions which though not fraudulent were prejudicial. Also, there is every reason to assume that the jury convicted defendants of the crime specified in the court's charge, and not some other crime.

The error of the court below is so obvious and so plainly violates the basic right of the defendants to be informed

of the charge on which they are tried that the intervention of this Court is plainly required.

Conclusion

It is respectfully submitted that for the above-stated reasons the petition for writs of certiorari should be granted.

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HOMER CUMMINGS,
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Counsel for Petitioners.

April, 1945.

(7625)

(31)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1109
DONALD F. MOORE,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1110
JOHN E. LINDH,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1111
JAMES J. FITZPATRICK,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1112
ERNEST F. WILLARD,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1113
CLARENCE W. CANDLIN,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1114
LEONARD B. CRUSER,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

No. 1115
WALTER H. MADDAMS,
Petitioner,
vs.
THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

DANIEL O. HASTINGS,
WILLIAM A. GRAY,
HOMER CUMMINGS,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 1109-1115

DONALD F. MOORE, JOHN E. LINDH, JAMES J. FITZPATRICK, ERNEST F. WILLARD, CLARENCE W. CANDLIN, LEONARD B. CRUSER AND WALTER H. MADDAMS,

vs. *Petitioners,*

UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners, Donald F. Moore, John E. Lindh, James J. Fitzpatrick, Ernest F. Willard, Clarence W. Candlin, Leonard B. Cruser, and Walter H. Maddams, pray that writs of certiorari be issued to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on December 1, 1944, affirming the judgments of the United States District Court for the District of Delaware.

Opinions Below

The opinion of the District Court denying motion for directed verdict (A. 227a),[1] is not officially reported. The opinion of the Circuit Court of Appeals (SA. 185-198) is not yet officially reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on December 1, 1944 (SA. 198-205). The petitioners timely filed a petition for rehearing (SA. 207-226). The Circuit Court of Appeals on January 26, 1945 (SA 227), and on February 24, 1945 (SA. 227-228), entered orders amending its opinion. Order denying petition for rehearing was entered February 28, 1945 (SA 229). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented

1. Whether the evidence is sufficient as a matter of law to sustain a conviction for conspiracy to violate the mail fraud statute and Section 17(a) of the Securities Act of 1933 by use of the mails in furtherance of a scheme to defraud and by employment of the same fraudulent scheme in the sale of securities by mail and by other means of interstate communication where the evidence shows merely close association with alleged conspirators and fails to show knowledge by the defendants of the illegal objects of the conspiracy and is equally consistent with an hypothesis of innocence as of guilt.

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[1] References herein are to:
"A.—" Petitioners' Appendix
"SA.—" Petitioners' Supplemental Appendix
"GA.—" Government's Appendix
"R.—" The stenographic transcript.

2. Whether a conviction on a single count for conspiracy to violate Section 17(a) of the Securities Act of 1933 and as well to violate the mail fraud statute can be sustained where the only evidence to show purpose to violate such statutes shows that the only use of the mails or any means of interstate communication by or on behalf of any of the alleged co-conspirators—a report by the vendor's agent to the vendor of the fact of the sale of the alleged security—occurred subsequent to the completion of the sale of the alleged security, involved no solicitation of, or communication to, the purchaser, and was not for the purpose of lulling the purchaser, or concealing the sale, and fails utterly to show that the use of the mails or interstate means of communication was in any way in furtherance of the sale.

3. Whether, when the evidence relied upon by the Government to establish the sale of "a security" in a prosecution for conspiracy to violate Section 17(a) of the Securities Act of 1933 and the mail fraud statute consists not only of a document but as well of testimony as to alleged oral representations at the time of its transfer, the question as to the sufficiency of the evidence to establish the sale of "a security" within the statutory meaning of that term may be determined by the Court as a matter of law and withdrawn from the jury, or is properly to be submitted to the jury under instructions as to the applicable law.

4. Whether admissions by co-defendants as to essential elements of the crime charged made by such co-defendants to an investigating agent of the United States Bureau of Internal Revenue, and procured and induced as a direct result of his promise not to cooperate with a pending SEC investigation, are as a matter of law within the privilege against self-incrimination under the Fifth Amendment and as well incompetent and inadmissible as against petitioners.

5. Whether, where in an indictment for conspiracy to violate the mail fraud statute and Section 17(a) of the Securities Act of 1933, there is alleged a single scheme to defraud by organizing a club so that the defendants could fraudulently obtain money from persons joining the club, and where the case is tried on the theory that the club was set up to carry out the scheme to defraud and that but a single scheme is involved—Whether the evidence is sufficient as a matter of law to sustain conviction on the indictment where a finding of fraudulent purpose on the part of any of the defendants at the time of the organization of the club (in 1928) can be made only by the violent assumption that, from actions of some of the defendants (in 1934, a year after the club was reorganized for expansion) allegedly evidencing their fraudulent intent immediately prior thereto, it may be retrospectively inferred that such fraudulent purpose and intent existed at the time the club was formed more than five years earlier.

Statutes Involved

The Act of May 4, 1909, c. 321, sec. 215, 35 Stat. 730 (18 U. S. C. sec. 338) provides:

> Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any post office * * * to be sent or delivered by the post office establishment of the United States, or shall take or receive * * * therefrom, any such letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of 1933, May 27, 1933, c. 38, Tit. I, 48 Stat. 84 (15 U. S. C. sec. 77) provides:

> Sec. 17(a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud * * *. (15 U. S. C. sec. 77q(a))
>
> * * * * * * *
>
> Sec. 24. Any person who willfully violates any of the provisions of this subchapter * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both. (15 U. S. C. sec. 77x)

Section 37 of the Criminal Code (18 U. S. C. sec. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Statement

Petitioners were named as defendants in an indictment in a single count returned September 22, 1942 and charging them with conspiracy with each other and with others who were not indicted but were referred to as co-conspirators to violate the mail fraud statute and the fraud provisions of Section 17 of the Securities Act of 1933 (A. 96a-106a) all in violation of 18 U. S. C. sec. 88. The case was consolidated for trial with the case of *United States* v. *Monjar, et al.*, involving the indictment under which were

tried the petitioners in the companion petition for certiorari *Monjar* v. *United States*, Nos. 1104-1108 (A. 2a).

There was a verdict of guilty as to all the petitioners with a recommendation of mercy. Maddams was sentenced to six months imprisonment and a fine of $500; Moore, Fitzpatrick, Cruser and Candlin were sentenced to one year and one day and a fine of $1000 each; Lindh and Willard were sentenced to eighteen months imprisonment and a fine of $1500 each. All the defendants were placed on probation for two years (A. 11a-14a). Appeals from the convictions under the two indictments were heard and considered together. The Circuit Court of Appeals affirmed (SA. 198-201) and denied petition for rehearing (SA. 229).

The indictment.—The indictment in this case, returned September 22, 1942, alleged that the defendants and others[2] had conspired with each other and with the petitioners in No. —, *Monjar* v. *United States*,[3] to violate the mail fraud statute (18 U. S. C., Sec. 338 and the Securities Act of 1933, Sec. 17 (a), 15 U. S. C., Sec. 77 q(a). The scheme alleged was, with the addition of nine paragraphs, identical with that alleged in count 1 of the indictment in the *Monjar* case, *supra* (A. 96a, 99a, 20a-42a). The substance of the 51 paragraphs of count 1 of the Monjar indictment is fully set forth in the Petition for Certiorari in Nos. 1104-1108 and need not here be repeated. In substance the nine paragraphs thus added alleged that on or about the time Monjar and others were indicted in May, 1942, the defendants assisted Monjar in setting up a declaration of trust in which two of the defendants, Candlin and Mad-

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[2] Of five others named as defendants in the indictment, there was a severance as to one in the Armed Service (GA. 2), a nolle pros as to one because of illness (A. 7a) and three were acquitted (A. 8a).

[3] The petitioners in the *Monjar* case were not included in this indictment but were named as co-conspirators (A. 98a).

dams, and Cook, were made trustees; that they employed agents for the stated purpose of liquidating loans made to Monjar; that they approached persons who had made the loans to make contributions of the amount of their loans; and that the agents were instructed to promise that the contributions would be returned. A part of the alleged scheme was that the defendants would cause the agents to give to those solicited a summary of the charges made against Monjar and his associates which would not be true and accurate; and that the agents were caused by the defendants to omit to state that the money loaned had been dissipated.

Observation of counsel.—A hindsight view of all the testimony introduced by the Government suggests now that it would probably have been advantageous to the defendants in the second indictment to have had separate counsel.

The evidence.—The evidence adduced by the Government in proof of the allegations contained in the first 51 paragraphs of the Monjar indictment has been stated in the companion Monjar petition insofar as that evidence related to the activities of the defendants named in that indictment. Insofar as the statements contained in the companion petition described the organization of the Mantle Club, the Key Publishing Company, the Golden Braid Costume Company, the American Business Management Corporation, the American Business Research Corporation, the American Distributing Corporation, and the Independence Club of America and the operation of those entities, the general framework of the alleged scheme has been adequately described.

The principal ground of this petition rests upon the contention that the Government failed to prove under applicable law that the individual defendants herein named participated in a conspiracy to defraud. It is for this rea-

son that this statement of facts is limited to a summary of all the evidence as to the relationship and connection of the seven defendants with the general scheme set in motion by the defendants named in the Monjar indictment.

The seven individuals herein concededly participated by way of affirmative action in the organization and conduct of the activities of the Mantle Club, the Key Publishing Company, and to a lesser extent of the Golden Braid Costume Company.

The greater portion of the evidence on which the Government relied to connect these defendants with the main conspiracy is to be found in the affidavits submitted by them in support of their application for a Bill of Particulars, and subsequently put in evidence by the Government (GA 1517a-1637a, 949a). From these it appears that all of these defendants joined the Mantle Club at various dates between 1929 and 1932, were original members of the Mantle Club under its revised charter of 1933, and had been employed by the National Board of Governors of the Club in varying capacities at salaries ranging from $25 per month for part-time work up to $4,000 a year. Two were employed by other entities for short periods: Lindh was paid for tax and accounting work as active manager of the American Business Management Corporation, and Candlin who was employed as treasurer of the Key Publishing Company.

All acquired from 10 to 20 shares of the stock of the Key Publishing Company either by original subscription or by subsequent acquisitions at the original issue price. For a short period after the formation of that Company, most of the defendants sold Key Magazines on a commission basis. They had no official position with the Company with the exception of Fitzpatrick who was an editorial contributor (GA 1556a) and Candlin who became treasurer in 1941 at

a salary of $328 per month. From and after 1940 when these defendants (with the exception of Maddams) became members of the National Board of Governors of the Mantle Club, they participated in the purchase of Key Magazines from the Key Publishing Company. During this period the Mantle Club purchased 10,641 issues of the Key Magazine and sold 34,466 back issues from its inventory. Over the course of years that they held the stock of Key Publishing Company defendants, respectively, received total dividends ranging from $186 to $1540. In large amount, these dividends were loaned to Monjar (GA 1662a-1663a).

The defendants had no knowledge or information concerning the Golden Braid Costume Company other than that it produced costumes for the Mantle Club. The direct evidence indicates they did not learn the identity of its stockholders until after the purchase of costumes by the Mantle Club had been discontinued (GA 1535a, 1549a, 1559a, 1620a, 1633a), although the defendants Lindh and Candlin, since they assisted in the bookkeeping and tax work of the Company, possibly acquired some knowledge of the stockholders. However, as members of the National Board of Governors of the Mantle Club the defendants in 1940 and 1941 did authorize the purchase of costumes in number beyond the immediate needs of the club but based upon prior authorizations by the Mantle Club council, the governing body established for the Club in 1940 (A. 390a-394a). Each defendant stated that the purchases were made in the exercise of their business judgment in the light of the then known rate of growth of the club, its membership goal of 100,000 members, and having regard for anticipated scarcity of materials and the reasonable price for which the garments could then be obtained.

Except for a general knowledge of the purported objectives of the other corporations named in the indictment,

none of the defendants had any connection with them except that some had been induced to purchase stock in them.

The proof shows that these defendants themselves loaned money to Monjar prior to the inception of the organized loan solicitations described in the companion indictment and thereafter, but not as participants in any organized PL or CD meetings. The totals of these by the several defendants ranged in amount from $780 to $2,900. None of these defendants were ever present at a personal loan meeting at which loans were solicited and representations made of the character alleged in the indictment (A. 352a-364a). The affirmative evidence shows that these individuals had no knowledge of the manner in which Monjar expended the loan proceeds (A. 352a-365a, GA 1507a, 1673a, Q and A No. 22, GA 178a-179a, R. 6804-6805). It was not until after the investigation of the Mantle Club activities in Pittsburgh in December, 1941, and in Wilmington in January, 1942, that any information whatever was disclosed to these defendants as to the size of the personal loan account. In January, 1942, subsequent to the investigations, approximately 4,500 affidavits from personal loan subscribers were exhibited to these defendants (R. 6367-6374, A 314a, 279a, SA. 62). These affidavits (Def. Ex. 71) stated that the lenders did not expect any payment except the principal amount of the loan, that they were not obtained by pressure and that they were in no sense in the nature of investments. By action of the principal defendants the loans were discontinued in February, 1942, and about the same time the defendants here together with a number of the other associates of Monjar offered in writing to assist Monjar by cancelling their own loans (Def. Ex. 21, SA. 158). Thereafter, upon the advice of tax counsel for the Club [4] the tendered cancellation of indebtedness was rejected and to avoid income tax liability

[4] Tax counsel for the Club, Paul F. Meyers, of Washington, D. C. (R. 7617-7619).

the liquidation of the loans was placed on a contribution basis (SA 66). Accordingly, on May 21 (A. 173a) five days before the indictment was returned a liquidating trust was established in which defendants Maddams and Candlin were associated as trustees with A. J. Cook, named as a defendant in the Monjar indictment. All the defendants herein donated to the liquidating trustees amounts equal to their loans together with their stock in the Key Publishing Company which had been purchased with their own funds (GA. 1529, 1540, 1553, 1563, 1577, 1626, 1637, 1591a-1595a, 1626, 1637). No testimony connected any of these defendants with the solicitation of the contributions in accordance with the terms of the liquidating trust except Candlin and Maddams who as trustees and in their affidavits acknowledged that they gave written instructions for the solicitation of contributions on behalf of Monjar (GA. 1574a-1577a, 1623a-1626a).

These instructions and all of the documents concerning the liquidation appear at GA. 1578a-1614a.

By September 16, 1942, about $800,000 in contributions had been received by the trustees (A. 380a, 315a).

The defendants, Candlin and Maddams, justified their actions in participating in the liquidating trust on the ground that they relied upon the affidavits exhibited to them and had no knowledge or belief that the loans had been improperly obtained (A. 314a) and based upon their own complete confidence in Monjar (A. 297a-302a) and upon the theory that they did not believe anything improper had been done, but that if the facts alleged in the indictment were true they assumed that no person would make any contribution of his funds upon being advised that Monjar had been indicted therefor (A. 312a-313a). The Trustees did instruct their agents to inform every person from whom contributions were solicited that two indictments were pending, one by state authorities in Pennsylvania and the other by the United States in Wilmington and that said

indictmants charged fraud (GA. 1575a-1577a-1608a-1612a).

There is no evidence in the record which would charge any of the defendants with knowledge of any false statement or promise made in connection with the solicitation of the loans, or made in connection with the solicitation, of contributions to the Trustees for Monjar's benefit.[5]

Not a single one of these defendants received or retained any personal loan funds whatever (GA. 1797a-1803a). Their sole income came from salary from the Club or in single instances the Publishing Company or the Management Corporation.

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Third Circuit erred in holding:

1. That there was evidence sufficient to sustain the verdict of guilty against petitioner for conspiracy to violate Section 17(a) of the Securities Act and the mail fraud statute.

2. That use of the mails after completion of the sale of a security is a use of the mails "in the sale" of a security within the meaning of Section 17(a) of the Securities Act of 1933.

3. In failing to hold that a verdict of guilty of conspiracy to violate Section 17(a) of the Securities Act of 1933 and the mail fraud statute must be set aside where there is no evidence that the provisions of the Securities Act would be violated by the purpose of the conspiracy or the means of accomplishing it.

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[5] The Government produced two witnesses out of 5,000 loan subscribers on the subject of contributions to the Trustees. One retracted his testimony on cross-examination (SA. 34 R. 4298); another testified that the defendant Clark made false statements to him (SA. 24), but Clark was acquitted by the Jury (A. 759a). Neither of these witneses mentioned any convicted defendant in his testimony, nor was any other testimony adduced to connect the defendants here with the individuals who were stated to have made the representations.

4. In failing to hold that the trial court erred in directing the jury that as a matter of law, the personal loan transactions constitute a sale of securities as the terms "sale" and "security" are defined in the Securities Act of 1933.

5. In holding that confessions by petitioners' co-defendants induced and influenced by promises of non-cooperation with the SEC by the Internal Revenue Agent to whom they were made are not thereby rendered incompetent under the Fifth Amendment and as well incompetent and inadmissible against petitioner.

6. In holding that after indictment, trial and verdict of guilty for conspiracy to violate the mail fraud statute and on instructions all limited to allegation and proof of a scheme to defraud by the formation of a club, conviction may, in the absence of evidence of such scheme, nevertheless, be sustained so long as some scheme is shown to have existed at the date of the use of the mails.

7. In holding that evidence of acts in 1934 from which fraudulent intent of defendants in that year were inferred permits of the further and retrospective inference that defendants had such fraudulent purpose at a time five and even seven to ten years earlier.

Reasons for Granting the Writs

1. **There was no evidence sufficient to connect the seven defendants in this indictment with the alleged conspiracy.**— The defendants here rely primarily on two established legal principles: First, proof of participation in a conspiracy is not established by mere evidence of the doing of a series of acts that further the conspiracy; and, second, when circumstantial evidence only is adduced, conviction for conspiracy cannot be sustained unless there is affirmative proof to establish, to the exclusion of every other reasonable hypothesis, that the defendants had knowledge of the illegal

objects of the alleged conspiracy. *United States* v. *Falcone*, 311 U. S. 205, 211; *Direct Sales Company* v. *United States*, 319 U. S. 703, 711.

The Government made no effort during the course of the trial to charge the defendants herein with knowledge of the illegal objects of the conspiracy other than by offering in evidence a letter from the Minneapolis Board of Governors transmitted under date May 28, 1942 (Gov. Ex. 280, GA. 1759a). This was offered specifically, and received, on the theory that it placed the defendants upon notice of the charges being made against the principal defendants in the *Monjar* case. However, it was mailed, and necessarily received, subsequent to the return of the first indictment May 26, 1942, and added little or nothing to the charges of that indictment. It was admittedly based on hearsay declarations twice removed.

The evidence establishes conclusively that each of these defendants had a blind faith in Monjar's ability and good intentions (A. 277a-279a—Lindh; A. 297a—Maddams; A. 313a—Candlin; GA. 1723a—Willard; A. 264a—Cruser). This faith was predicated upon thousands of letters directed to the club and to the publishing company stating the benefits received by members from their partipation in club activities and from reading the Key Magazine (Defs. Exs. 74 and 75). Actions explainable by reliance upon another's apparently good intentions are not sufficient to prove participation in a conspiracy. And up to now, the relatively rare quality of true loyalty and steadfast adherence to an idolized leader has not been deemed a basis for criminal prosecution. As pointed out in *United States* v. *Wise*, 108 F. 2d 379, 382 (C. C. A. 7):

> "it is nevertheless often true that eligibility to appropriate guardianship proceedings is not sufficient to establish participation in a crime where evil intent is an essential element. *Particularly is the above true*

when the apparent stupidity arises from faith in a friend, placing trust in one whom subsequent events prove unworthy of trust.'' (Emphasis supplied.)

Here the evidence is uncontested that there was a close association between these defendants. There was almost daily contact with the Defendants Cook and Jones and somewhat less frequent contact with Monjar and Drew. But close association does not suffice as a ground upon which to sustain conviction of participation in a conspiracy. *Weniger* v. *United States,* 47 F. 2d 692 (C. C. A. 9); *Mazurousky* v. *United States,* 100 F. 2d 958, 961 (C. C. A. 9); *United States* v. *Koch,* 113 F. 2d 982, 983 (C. C. A. 2); *Tingle* v. *United States,* 38 F. 2d 573, 575 (C. C. A. 8); *Linde* v. *United States,* 13 F. 2d 59, 61 (C. C. A. 8); *Copeland* v. *United States,* 90 F. ed. 78 (C. C. A. 5); *Goodman* v. *United States,* 128 F. 2d 854, 856 (C. C. A. 9); *Lee* v. *United States,* 106 F. 2d 906 (C. C. A. 9).

With respect to the Key transactions there is no evidence of participation with knowledge in acts tending to show an unlawful aim. With respect to the costume transactions, the hypothesis of innocence: that the purchases were made in the exercise of a reasonable and honest business judgment, is well founded in the evidence and fortified by the absence of any motive of personal gain. Certainly, it cannot reasonably be suggested that the purchase of quantities of merchandise in excess of the present needs of any club or business of itself involves an hypothesis of guilty participation so strong as to exclude any theory of innocent error and to ''point not to the possibility or probability, but the moral certainty of guilt''. *Kassin* v. *United States,* 87 F. 2d 183 (C. C. A. 5).

The thousands of letters referred to, the exhibit showing the results of an unsigned questionnaire submitted to substantially all the members of the club (A. 625a) the con-

tinual evidence of work well done (e. g. A. 628a-672a, A. 316a-344a) establishes again the most reasonable hypothesis to be that, in receiving the allegedly "large sums of money by way of salary and expenses" the defendants acted in good faith without knowledge of an unlawful purpose in the operation of the Mantle Club.

With respect to the loans, there is not only lack of evidence of knowledge as to the unlawful objects of the conspiracy to obtain them, but as well, a failure of proof that these defendants were ever present and heard, or ever had reported to them, the false statements and extravagant promises allegedly made in connection with the solicitation of the personal loans. As pointed out above, the evidence shows that these defendants were, equally with the others, the victims of a very poor loan arrangement with Monjar. Here the defendants furnished their services which furthered the conspiracy to an organization which admittedly accomplished a tremendous amount of good for its members.[6] All of the evidence adduced at the trial with the exception of that pertaining to the personal loans was but circumstantial evidence of the existence of a scheme to defraud. As such, that evidence had to carry the greater burden of excluding any reasonable inference of good faith. If the circumstances proved with respect to the club, magazine, costumes and corporations leave open the hypothesis that these defendants acted in good faith, then the convictions must be reversed. *McLaughlin* v. *United States*, 26 F. 2d 1; *Turinetti* v. *United States*, 2 F. 2d 15; *Yusem* v. *United States*, 8 F. 2d 6; *McDonald* v. *United States*, 9 F. 2d 506; *Graceffo* v. *United States*, 46 F. 2d 853.

The law is rather clear on the subject. This court has recently twice delineated the proof essential to conviction

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[6] A condition of probation for the paroled defendants fixed by the courts was that they need not surrender their membership in the Mantle Club.

for participation in criminal conspiracy. As pointed out in *Direct Sales Company* v. *United States*, 319 U. S. 703, 711:

> "Without the knowledge, the intent cannot exist. United States v. Falcone, 311 U. S. 205. Furthermore, to establish the intent, *the evidence of knowledge must be clear;* not equivocal. Ibid. This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." (Emphasis supplied.)

Here again the dragnet has been invoked to convict sincere men who happened merely to have the misfortune to possess the virtue of faith in another. It may be confidently predicted that, successful as it was in the court below in submerging these defendants under the vast mass of documents and testimony accumulated by industrious investigators and counsel, the Government will not now even attempt to set out or analyze the specific evidence upon which it relies as demonstrating the guilt of each of these petitioners.

2. **The erroneous construction of the Securities Act by the court below involves a recurring and highly important question of Federal law which should be decided by this Court.**—The argument in support of this point is set out in full in Point 1 of the Petition for Certiorari in the *Monjar* case (Nos. 1104-1108) and is adopted by reference here. It is plain that the only evidence introduced to show that the single conspiracy count in this indictment contemplated acts in violation of Section 17 of the Securities Act consisted of the acts proved by the Government and by it relied upon to sustain convictions on the substantive counts for violation of the same section. But as is fully developed in Point I of the *Monjar* petition, the Circuit Court of Appeals erred in holding that the acts of defendants are violations of Section 17 of the Securities Act and it, therefore, necessarily results that there was no evidence

upon which a jury could rightly find the existence of a conspiracy to violate Section 17 of the Securities Act, as alleged in this indictment.

The defendants' motion to withdraw from the jury all consideration of the evidence offered to sustain the allegation that the defendants conspired to violate Section 77q (a) of Title 15, U. S. C. (A. 686a) was overruled and exception noted (A. 750a). Error was properly assigned (A. 784a).

For the reasons stated in the *Monjar* petition, Nos. 1104-1108 (pp. 30-32) and under the decision of the Circuit Court of Appeals there cited, since the jury was, over objection, permitted to consider together defendants' guilt in respect to frauds under the Securities Act as well as under the mail fraud statute, the verdict must be set aside. *United States* v. *Groves*, 122 F. 2d 87, 91 (C. C. A. 2); *United States* v. *Smith*, 112 F. 2d 83, 86.

3. **The trial court plainly invaded the province of the jury and deprived petitioners of their right to a jury trial in instructing as a matter of law that the personal loans constituted sale of securities within the meaning of the Securities Act.**—The decision of the court below is in plain conflict with the decision of this Court in *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, 355. This Court there held that where the proof that documents sold were "securities" within the meaning of the Act requires going outside the instrument itself to show the character given it by the terms of the offer and by the economic inducements, then such proof, in a criminal case, is subject to the "requirement of satisfying the jury beyond a reasonable doubt." The argument in support of this point is set out in full in Point 2 of the Petition for Certiorari in *Monjar* v. *United States*, Nos. 1104-1108, pp. 33-35, and is adopted by reference here.

4. **The decision of the court below holding admissible the confessions induced by promises of an internal revenue agent and given by the defendants indicted in the Monjar case is in conflict with decisions of this Court.**—The argument in support of this point is set out in full in Point 3 of the Petition for Certiorari in *Monjar* v. *United States*, Nos. 1104-1108, pp. 35-41, and is adopted by reference.

It is to be noted that these confessions were admitted in evidence generally without limiting the jury to consideration thereof only as against the defendants who respectively made them (R. 5028). The confessions were properly to be barred, not only because of the constitutional inhibition against self-crimination, but also because of the inherent probability or possibility that a confession given as the result of threats or inducing promises is false.

There can be no serious question that the evidence thus erroneously admitted was highly prejudicial to petitioners. The statements given to Internal Revenue Agent Cordes (Gov't Exs. 255 (GA. 1642a), 256 (GA. 1670a), 275 (GA. 1678a), 258 (GA. 1704a), 259 (GA. 1715a), 260 (GA. 1726a), 261 (GA. 1736a), and 262 (GA. 1742a) all constituted confessions of the truth of some of the essential parts of the guilty facts charged in the indictment and hence tended to show as against petitioners that at least there was in existence a fraudulent scheme constituting an element of the substantive crimes petitioners were charged with conspiring to commit.

The error of the Circuit Court of Appeals in sustaining the action of the district court in admitting these confessions requires reversal of the judgments against petitioners.

5. **The evidence was insufficient as a matter of law to show the existence of the scheme charged in the indictment and constituting the basic theory on which the case was tried and submitted to the jury.**—The errors of the court

in sustaining the sufficiency of the evidence to support the verdict on the grounds either: (1) that it was not necessary to prove the fraudulent scheme for which petitioners were indicted, and on which under the avowed theory of the Government they were tried and, by specific instructions to the jury, convicted; or (2) that from evidence allegedly tending to show a fraudulent scheme after the expansion of the Mantle Club in 1933 there may be retrospectively inferred a fraudulent intent and scheme in its formation in 1929, are pointed out in the argument under Point 4 in the Petition for Certiorari in *Monjar* v. *United States,* Nos. 1104-1108, pp. 41-53. That argument is here adopted by reference.

Essentially the same scheme there alleged was here alleged at the scheme constituting that essential element of the substantive offenses petitioners are charged with conspiring to commit. The errors are equally prejudicial to them.

Conclusion

It is respectfully submitted that for the above stated reasons the petition for writs of certiorari should be granted.

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April, 1945.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (S. A. 185–198) [1] has not yet been reported. The opinion of the district court overruling a demurrer to the first indictment (A. 111) is reported at 47 F. Supp. 421. Other opinions of the district court on the admissibility of certain exhibits offered by the Government (A. 216) and denying a motion for a directed verdict at the close of the Government's case (A. 227) are not officially reported.

JURISDICTION

The judgments of the circuit court of appeals were entered December 1, 1944 (S. A. 198–206). A petition for rehearing was filed on January 15, 1945 (S. A. 207–226). On January 26, 1945, and February 24, 1945, the circuit court of appeals entered orders amending its opinion (S. A. 227–228), and on February 28, 1945, entered an order denying the petition for rehearing (S. A. 229–230). The petitions for writs of certiorari were filed April 4, 1945. The jurisdiction of this Court

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[1] Petitioners' appendix in the court below is designated as "A."; petitioners' supplemental appendix in this Court is designated as "S. A."; the Government's appendix is referred to as "R."

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 27, 1934.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish the scheme to defraud alleged in the indictments and to show the participation therein of the petitioners convicted on the second indictment.

2. Whether the use of the mails and instrumentalities of interstate commerce to report progress of security selling activities and to remit the proceeds of sales, constitute a violation of Section 17 (a) of the Securities Act of 1933, where such activities were part of a scheme to defraud.

3. Whether the trial judge improperly withdrew from the jury the question whether the documents alleged to have been sold were securities within the purview of the Securities Act.

4. Whether statements made by certain of the petitioners to an internal revenue agent on condition that the agent would not cooperate in a pending Securities and Exchange Commission investigation constituted inadmissible confessions obtained by inducement of reward.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud,

> or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Securities Act of May 27, 1933, c 38, Title 1, 48 Stat. 74 (15 U. S. C. 77), provides in part:

> SEC. 2. (1) [as amended, 48 Stat. 905] The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable

share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud * * *

* * * * *

SEC. 24. Any person who willfully violates any of the provisions of this title * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined

not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

In May 1942, in the United States District Court for the District of Delaware, an indictment in 25 counts was returned against the petitioners H. B. Monjar, Josephine Monjar, Cook, Jones, and Drew (A. 1, 19–95). Seventeen substantive counts (Nos. 1–15, 23, 24) charged use of the mails in execution of a scheme to defraud (A. 19–74, 87–92); counts 16–22 charged the employment of a scheme to defraud in the sale of securities by use of the mails and instrumentalities of interstate commerce, in violation of Section 17 (a) of the Securities Act (A. 74–87); and count 25 charged conspiracy to violate the mail fraud statute and the fraud provisions of the Securities Act (A. 92–95).

The scheme to defraud, outlined in detail in the indictment, charged in substance that the defendants would, in 1928, form an organization known as the Mantle Club; that in 1933 they would expand the Club into a nation-wide organization (A. 20–22); that members of the Club would be told of Monjar's business ability and would subsequently be solicited to make personal loans to Monjar, in the course of which numerous false representations would be made to them (A. 24–35, 40–42); that a corporation known as the Key Publishing Company would be established

to publish a magazine and books containing articles written by Monjar which would be sold to members of the Mantle Club (A. 23); that with funds obtained through personal loans the defendants would establish various corporate enterprises in which they would be officers and stockholders, including the Golden Braid Costume Company, which would manufacture costumes for Mantle Club members and sell an excessive number of such costumes to the Club (A. 36–40); that the defendants would cause the Mantle Club to pay to them large salaries, bonuses and travel expenses (A. 40).

The other petitioners were subsequently indicted in September 1942 in one count for conspiracy to violate the mail fraud statute and the fraud provisions of the Securities Act, the nature of the scheme to defraud being the same as that alleged in the first indictment, with the addition of nine paragraphs relating to the activities of some of these petitioners in endeavoring to liquidate personal loans made to Monjar (A. 17, 96–106).

On stipulation of counsel, the two indictments were tried together (A. 2). On the first indictment there was a directed verdict for the defendants on counts 1, 4, 9, 19 and 22 (A. 734). The petitioners named in that indictment, with the exception of Josephine Monjar, were convicted on all the other counts (A. 8). Hugh B. Monjar was sentenced to imprisonment for 5 years on

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count 2 and one year on each of the other counts, to run concurrently with the sentence on count 2, and to pay a fine of $1,000 on each of 14 mail fraud counts, $5,000 on each of the 5 Securities Act counts, and $10,000 on the conspiracy count, the total sentence amounting to 5 years' imprisonment and $49,000 in fines (A. 9–10). The other petitioners convicted on the substantive counts of the first indictment were each sentenced to imprisonment for 3 years on count 2 and to concurrent prison terms of lesser degree on other counts, and to pay cumulative fines of $1,000 each on 5 of the substantive counts (A. 10–11). Mrs. Monjar was convicted on the conspiracy count (A. 8) and sentenced to imprisonment for eighteen months and to pay a fine of $10,000 (A. 11). On the second indictment the jury returned a verdict of guilty with a recommendation of mercy as to all petitioners named therein (A. 8). Petitioners Lindh and Willard were each sentenced to 18 months' imprisonment and to pay a fine of $1,500. Petitioners Moore, Fitzpatrick, Cruser, and Candlin were each sentenced to imprisonment for one year and one day and to pay a fine of $1,000. Maddams was sentenced to 6 months' imprisonment and to pay a fine of $500. As to all these petitioners, execution of the prison sentences was suspended and they were placed on probation for 2 years on condition that the fines be paid and petitioners sever all relations as employees of the Mantle Club or any affiliated cor-

porations. It was specifically stated that cessation of membership in the Mantle Club was not a condition of probation. (A. 12–14.) On appeal, the circuit court of appeals affirmed all the judgments of conviction (S. A. 198–201).

The evidence for the Government in respect of the scheme to defraud[2] may be summarized as follows:

Background of Monjar's activities.—In October 1924, in San Francisco, petitioner Hugh B. Monjar organized a group known as the Decimo Club, the expressed purpose of which was the procurement of justice and financial betterment for its members (R. 1449). By 1927 the Club had spread to 34 cities and claimed a membership of 62,000 (R. 1450). Monjar originally received all, and subsequently part, of the $20 initiation fees paid by persons joining the organization (R. 1449). Monjar also organized and controlled the Apasco Purchase and Sales Corporation, the subscribers to which were offered an opportunity to purchase merchandise at discounts (R. 1116–1117, 1451). The right to subscribe to the Apasco service was limited to members of the Decimo Club (R. 1117). In 1927 dissension developed in the Decimo Club prior to its annual convention. Litigation ensued

[2] No question is raised as to the sufficiency of the evidence to establish use of the mails in respect of the mail fraud counts. The legal question as to the sufficiency of the mailings under the Securities Act counts is discussed in Point II of the Argument, *infra*.

and both the Decimo Club and the Apasco Corporation disappeared as active organizations. (A. 494–499; R. 1453–1454.)

In 1928, in New York, Monjar organized a corporation known as H. B. Monjar, Inc., the purpose of which was to render vocational guidance to those who subscribed to its services (R. 1118, 1199, 1213–1214, 1455). As a result of adverse publicity by metropolitan newspapermen who attended its meetings, the corporation ceased to function (R. 1220, 1455). Thereafter Monjar organized a similar corporation known as the Business Executives Association (A. 554–555; R. 1200). He also formed the Holare Corporation which offered a service similar to that previously given by the Apasco Corporation (R. 1200–1201). Subscribers to H. B. Monjar, Inc. were given the "opportunity" to purchase stock in the Monjar company and were also invited to make loans to Monjar which it was asserted would result in substantial financial returns (A. 551, 568–569; R. 1201, 1203–1205, 1216–1217).

The Mantle Club.—In January 1928, while H. B. Monjar, Inc. was still in operation, one Robinson wrote to Monjar stating that a group of men desired to form a national organization and that, knowing of Monjar's vast experience, they wished him to assume chairmanship of a club to be organized on autocratic lines (A. 454–455). Monjar replied that he would accept leadership only if he

were permitted to have around him "the tried and trusted men" who had been of value to him in the past and who had been trained by years of experience (A. 455–456). A group of seven men, among whom was petitioner Cook, immediately accepted these conditions (A. 456; R. 1744). Due to discussion in respect of the nature of the constitution, and to the fact that Monjar and his associates were occupied with the Decimo Club litigation and the activities of H. B. Monjar, Inc., the Mantle Club was not formally organized until January 17, 1929 (A. 457–458). Both prior to and after its organization Monjar would meet with a group of men at least once a week and deliver talks (A. 562–563; R. 1120). The Mantle Club remained a small organization with a membership of about 125 until 1933 (A. 458–460). During this period there were no regular dues but there were assessments based on expenditures and at times various members loaned money to Monjar (A. 459, 563; R. 1182, 1219–1220, 1234). The Club had a board of governors of nine men (R. 1121). Included in this original group were a number of the present petitioners (A. 420, 423–424; R. 1232).

In 1933 it was decided to expand the Mantle Club into a national organization (A. 459, 556, 571). The board of governors was reduced from nine to three men, was made self-perpetuating, and given autocratic control (A. 466, 481; S. A. 56; R. 1745). Monjar, Cook, and Jones consti-

tuted the three-man board (A. 403, 472; R. 116, 1745). Under the new arrangement, the Club established 30 units in various parts of the country (A. 527; R. 1506), each under the jurisdiction of a local board of governors appointed by the national board (R. 68–69, 241–250). In 1940 the constitution was amended to provide for election of the local boards of governors by "full" members from a slate prepared by the local board (R. 250–251) and also for election of a representative to a national council, which in turn elected a ten-man board of governors (A. 367, 481). The initiation fee of $20 received from each member was remitted to the national board of governors, which had its headquarters at Wilmington, Delaware (R. 1414). Of the monthly dues of $2 per member, 50% was retained by the local board and 50% remitted to the national board (R. 342–343). Except in emergency situations, the local board of governors was authorized to make only such expenditures as were approved by the national board in a budget submitted to the national officers (R. 343).

Upon joining the Club a member was invited to an "investigation" meeting at which he would be told of Monjar's prior activities in the Decimo Club, of his great success, and of the opposition he had encountered (R. 240–241, 1169, 1412–1425, 1449–1456). After this recital a recess would be called and members were told that they were

free to withdraw if they wished. In subsequent "assimiliation meetings," the new members were instructed in the purposes of the Mantle Club and were told of Monjar's great business acumen. They were informed that sometime in the future those who proved themselves worthy would be rewarded by being offered an opportunity to share in Monjar's business plans. At all meetings of the Club, Monjar's abilities were stressed and members were exhorted as to the necessity of complete loyalty and confidence in Monjar. It was emphasized that participation in Monjar's business plan was separate and apart from membership in the Club but that Monjar intended to reward worthy men. (R. 243–247, 607, 677–678, 844–847, 1198–1199, 1210–1211, 1218, 1222, 1231, 1239, 1241, 1273.) Until 1940 members were given certificates stating that they had earned "co-points" for faithful attendance at meetings, payment of dues, etc., and were told that the certificates were valuable, although the reason for such value was never explained (R. 138–139, 143, 307–309, 499, 637–638, 696, 769, 783, 807–808, 845, 1269).

Each member of the Mantle Club was placed in a group of 10 under a captain, each group of 10 captains under a division head, each group of 10 division heads under a section head, and each district under the local board of governors (R. 66–67, 243–245). Each member was required to "con-

tact" his captain at least once a week (R. 71–72, 244) and was required to attend the official monthly meeting of his local unit (R. 84, 239). The monthly meetings always included an address based on Monjar's writings and the reading of Monjar's current article (R. 78–79, 82–83). During a recess in the meeting dues would be collected through the "contact structure" of the Club, each member paying dues to his captain, and the captains passing the money to the division heads, who in turn passed it on to the section heads (R. 76–77). In addition, there were numerous other meetings which members were "privileged" to attend, and meetings of the various captains, division heads, and section heads (R. 71–72, 83–84, 239–240, 772, 892). Members would be notified of meetings through the "contact structure" of the Club, each man in authority being responsible for notifying the 10 men directly under him (R. 72).

Personal loans.—In 1934, shortly before the organization meeting of the Oakland, California, unit, the first outside of the metropolitan New York area, Monjar wrote to petitioner Drew (Ex. 254; R. 1638–1641; see R. 1748–1751) instructing him to advise persons chosen from the proposed membership that they were to be given an opportunity to make personal loans to Monjar ranging from $3 to $20 a month for 10 months, "each man to profit * * * from the extent of the

money that he advances" (R. 1638–1639). Monjar stated that the money was to be used to pay him a salary of $3,000 per month, $500 of which was to be used by him for office expenses; that "I am merely trying to get back on a sound basis, where no one could conceivably criticize the source of my income and where I would have the means of making it extremely profitable for those who helped in this particular manner" (R. 1640). Drew decided that it would be "dynamite" to mention the salary expected (R. 1432) and did not refer to this condition (R. 1682–1683). He succeeded in getting 66 men to agree to make the loans (R. 1432–1433). There was thus initiated the system of personal loans which continued until 1942 (R. 1507, see R. 1765).[3] Certain members would be notified, through the "contact structure" of the Club, to attend a special meeting (R. 480–481, 489, 554, 566, 652, 878, 926). After the persons so chosen were assembled, they would be told that the meeting was not a Mantle Club meeting (R. 358–359, 469, 526), that those present had been selected because they had proved themselves worthy, and that they were about to be honored by being afforded the opportunity to make personal loans to Monjar (R. 359, 409–410, 506, 686, 857). It was explained that the loans were unusual, that the borrower fixed the

[3] The last two loans were called "C. D." instead of "P. L." loans (R. 268, 871).

conditions, that the loans were limited to sums ranging from $30 to $200 payable in 10 months in installments, and that Monjar could do what he pleased with the money (R. 259, 362, 506, 539, 555, 930). In later years, among the old established units on the west coast, where personal loans had been an annual event for some time, Monjar himself addressed the meetings and made promises of financial security which would result from the loans, such as statements that the lenders would receive an income of $250 a month at some time commencing in the near future, and that their financial independence had been assured (R. 366, 372–373, 411, 429, 483, 519, 528, 571, 654, 787, 805). Petitioner Drew spoke at almost all of the personal loan meetings (R. 356, 365, 490, 493, 517, 556, 569, 584, 652, 686, 1216, 1249, 1680–1683, 1688, 1690).

In Portland and Seattle Monjar issued friendship bonds of which he stated there were eventually to be 50 series. He represented that when a member had received No. 50 he would have an income of $250 per month. (R. 483–485, 490–493, 633–635, 697–698, 731, 740–741, 766–767, 775, 783, 791–793, 809–814, 821–823, 833.)

After the loans were solicited a member of the local unit of the Mantle Club would be appointed Monjar's P. L. (personal loan) agent (R. 925–931; R. 1688), usually serving without compensation (R. 1688–1689). Collections were made at

the official monthly meetings of the Mantle Club (R. 579, 585, 653, 866, 1472). Each P. L. agent gave a receipt for the money collected, signed by the agent (R. 419–420, 271–276, 1696–1697). These receipts constituted the securities referred to in the Securities Act counts of the indictment. The agent would purchase a cashier's check or draft payable to Cook with the money thus received and would send such draft to Cook by mail, together with a report of collections (R. 255–256, 596–597, 866, 1688). Cook was in charge of all records in connection with personal loans (R. 1506–1507).

From 1934 to 1942 personal loans to Monjar, excluding amounts repaid to members who withdrew from the Club, amounted to approximately a million dollars (R. 1765–1767, 1769). Various expenditures from this fund are set forth in detail in Government's Exhibit 294 (R. 1768–1771). They include such items as $471,661.20 withdrawn by checks to the order of H. B. Monjar and to cash, $118,000 paid to Monjar's former wife as separate maintenance and as a property settlement at the time of divorce, $12,000 to Tiffany & Co. for the purchase of jewelry, $2,000 for flowers, and $200,000 for taxes.[4]

Key Publishing Company.—In 1933, prior to the expansion of the Mantle Club, the Key Pub-

[4] The taxes were upon income derived from the Apasco Corporation, not for any venture connected with the Mantle Club (see Ex. 218, not printed).

lishing Company was organized to publish a magazine containing Monjar's messages (A. 460–461; R. 23–24). The corporation had an authorized capitalization of 1,000 shares of a par value of $1 (R. 23, 25). Approximately four hundred dollars was subscribed, and with this sum publication was commenced (A. 462; R. 81). Jones was president, Cook vice-president and treasurer of the company, and Monjar was its managing editor (R. 23–24, 39). Until 1938 Monjar received a salary for his services and Jones and Cook as officers also received salaries in varying amounts (R. 1807). In December 1937 the company published a collection of Monjar's essays under the title "The Code of Ethics." Monjar received $1 royalty per book and at that time he declined further to accept a salary as managing editor of the magazine. (R. 32–35.) Later a supplement to the Code of Ethics was issued for which Monjar also received a royalty of $1 per book, subsequently reduced to twenty cents per book on both the Code and supplement (R. 37–38).

The Key magazine was sold to members of the Mantle Club through distributors originally chosen from the membership and subsequently incorporated (R. 29, 38). In 1941 the Key Publishing Company entered into a contract with the American Distributing Corporation, of which petitioner Drew was president, by which the latter company would solicit orders for the magazine at a commission (R. 1322–1325). It was the prac-

tice of the national board of governors of the Mantle Club to purchase a major part of the output of the Key Publishing Company at the wholesale price of 15 cents per copy and then resell copies to the Key Publishing Company as the latter needed them (R. 58–65). For example, in the year 1937 the Mantle Club purchased 240,000 current issues and 207,947 back issues and resold to the Key Publishing Company 40,247 issues (R. 1366). During the years from 1933 to 1942 approximately four million copies of the magazine were published, but only a little more than two million were sold by distributors (R. 1364–1365). The Mantle Club in that period purchased 1,165,388 copies and resold to the publishing company 274,432, leaving 890,956 undistributed copies in the hands of the Mantle Club (R. 1365–1366). Many of the magazines never left the warehouse of the Key Publishing Company (R. 100–101). As of December 31, 1941, the Mantle Club carried among its assets an item of $133,306.35 worth of the magazine, the "American Key" (R. 1783).

The Key Publishing Company paid substantial dividends on its $1 par value stock (R. 1346–1357). In the year 1940 the dividends amounted to $35 per share (R. 1350–1351). All the petitioners except Monjar and Mrs. Monjar participated in these dividends (R. 1794–1803).

The Golden Braid Costume Company.—In 1936, from money received from personal loans, Monjar gave to Mrs. Josephine T. Drew, who later became

Mrs. Monjar, and to his sister, Mrs. Mason, the sum of $10,000 to organize the Golden Braid Costume Company (R. 160, 167–168, 1647–1648, 1705). The Company manufactured a costume which was to be used in the ritual of the Mantle Club. The national board of governors of the Mantle Club bought all the costumes manufactured by the Golden Braid Company, a total of more than 50,000 costumes. (R. 230, 232, 1389, 1646.) The total membership of the Mantle Club at its peak was less than 35,000 (R. 1505) and the number of full members, the only ones authorized to wear the costume, was considerably less (R. 758–759, 840–841, 934–935). Many of the garments sold to the Mantle Club never left the warehouse of the Golden Braid Company (R. 233). Of those that were actually delivered, many were kept in cabinets in the offices of local boards of governors, for the national board of governors shipped to various local boards and ordered the local boards to pay for many more costumes than there were members entitled to wear them (R. 756–758, 840–841, 934–935, 971, 1246–1247, 1285–1289, 1718). For example 2,000 garments were sent to the St. Louis unit, and less than 150 were sold to members (R. 756–758).

Mrs. Drew and Mrs. Mason received dividends totalling $77,600 and $17,900, respectively (R. 1791). In the years 1936 to 1940 Mrs. Drew[5]

[5] In 1940, when she married Monjar, Mrs. Drew resigned from the Company and sold her stock (R. 162, 1709).

received a salary of $1,500 per month, for a total of $66,000 (R. 1791).

Other activities.—With P. L. funds Monjar organized the American Business Research Corporation and the American Business Management Corporation, and through Cook and Jones advanced to a number of men close to him money with which to buy stock in these organizations (R. 183–184, 716–721, 1022, 1047, 1521, 1527, 1537–1538, 1549–1550, 1561–1562, 1583). The Research Corporation was supposed to render statistical information, but the only activity in which it engaged was a "survey" of Portland families, material for which was collected on a voluntary basis or by persons working for small compensation (R. 185–188, 219–228, 1684–1694). The results of this survey were for the most part not even examined (R. 206–207), but $24,000 was paid to a company known as the Portland Research Corporation (R. 195). The Research Corporation had a contract with the Golden Braid Company and with the Key Publishing Company under which it was paid $1,000 per year by each of these corporations (R. 196–197). In the latter part of 1942 petitioners Jones, Cook, and Drew turned over to the Research Corporation shares of stock which they owned in the Key Publishing Company, and the Research Corporation sold this stock to the American Distributing Corporation for $40 per share, thus securing funds which, with

its own balance, proved sufficient to enable the Research Corporation to liquidate at 100 cents on the dollar (R. 198–203).

The American Business Management Corporation was supposed to render tax and accounting services to its subscribers, all of which were corporations having Mantle Club or affiliated members, including the Golden Braid Company, the Research Corporation, the American Distributing Corporation, and the Key Publishing Company (R. 136, 163, 1525, 1693–1694). Petitioner John Lindh was manager of the Business Management Corporation (R. 720).

Liquidating trust.—After the first indictment was returned against Monjar and his codefendants in May 1942, petitioners Cook, Maddams, and Candlin constituted themselves a group of trustees and undertook to liquidate the personal loans of Monjar (R. 1039–1040, 1067, 1578–1589). These individuals appointed agents who were to interview members of the Mantle Club who had made loans to Monjar. The agents were given explicit instructions as to procedure (R. 1596–1604). Members were questioned about their loyalty to Monjar. If the person interviewed indicated that he wished the return of his money, the interview would be terminated. If, however, the member expressed loyalty to Monjar he would be given in cash the amount of his loan and asked to sign a receipt therefor. Immediately following he was

asked to contribute to a fund being set up to liquidate the other loans. (R. 1044–1045, 1070, 1072, 1075, 1077, 1596–1604.) In this manner the liquidating trustees were able to obtain receipts showing repayment of about $800,000 of the personal loans (R. 1072–1073). At least some of the persons so "repaid" were under the impression that their donation to the new fund was a means of securing the ultimate return of their original loans (R. 1082, 1211, 1216).

Participation of petitioners.—The participation of the petitioners named in the first indictment (Monjar, Mrs. Monjar, Cook, Jones, and Drew) appears from the summary of the evidence above.

As to those named in the second indictment, they were all, with the exception of Maddams, members of the national board of governors of the Mantle Club from 1940 to the time of the return of the indictment (R. 141, 893). Prior to the expansion of the national board in 1940, all of them had been employed by the board (R. 193, 1022, 1046, 1084, 1309–1310, 1517–1518, 1531, 1542, 1555, 1565, 1627–1628). Admittedly, as members of the board of governors, they all authorized the purchase of 17,072 issues of the American Key Magazine with Mantle Club funds (R. 1519, 1533, 1544, 1557, 1567–1568, 1629) and authorized the expenditure of $100,000 of Mantle Club funds for purchase of costumes in excess of the total net membership of the Club (R. 1522–1523, 1536, 1548,

1559, 1571, 1632).[6] Admittedly, also, all of them knew that Monjar was soliciting personal loans from members (R. 1046, 1063, 1083–1084, 1098, 1520, 1534, 1546, 1558, 1569, 1618–1620, 1630). Petitioners Willard and Cruser had for a time acted as P. L. Agents (R. 1545, 1630). Maddams was employed in the office of the treasurer of the Club (R. 1616). Although paid with Mantle Club funds, he devoted about 50% of his time to keeping P. L. records (R. 1037, 1042–1043, 1731), which were kept in the national offices of the Club (R. 1055, 1101). Cruser also for a time helped Cook prepare P. L. records (R. 1055).

All of these petitioners owned stock in the Key Publishing Company and received dividends thereon (R. 1519, 1533, 1544, 1556, 1566, 1617, 1628). Fitzpatrick and Candlin were employed by the Key Publishing Company and were directors and officers thereof (R. 1556–1557, 1566–1567, 1065). Money was advanced to all of them to buy stock in the American Business Management Corporation and the American Business Research Corporation (R. 1521, 1537–1538, 1549–1550, 1561–1562, 1569, 1573, 1619, 1621, 1634–1635). Lindh was manager of the Business Management Corporation (R. 146). Petitioner Willard was successively vice-president and president, and petitioner Moore

[6] Willard, as the person in charge of ritual, displayed the costumes and gave directions in respect thereto before shipments were made to the local boards (R. 756–758, 1718–1719).

was vice-president, of the Business Research Corporation (A. 229; R. 1538, 1550). The part Candlin and Maddams played in the liquidating trust is set forth *supra*, pp. 22–23. In addition, petitioner Lindh aided in securing stock of the various Monjar corporations for the liquidating trustees (R. 1087, 1529) and petitioner Willard for a short period acted as an interviewer for the trustees (R. 1552–1553). Lindh spoke to a group in Minneapolis who sought information concerning the charges made against Monjar, and refused to discuss the question of dividends paid by the Golden Braid Costume Company because no one present was a stockholder (R. 973–975, 999–1010).

The sums received by each of the petitioners from the Mantle Club and related activities are itemized at R. 1793–1807.

ARGUMENT

1. The petitioners named in the first indictment do not deny that the evidence adduced at the trial established a scheme to defraud and their knowing participation therein. They contend merely (Pet. I, 3–4, 22, 41–53)[7] that the evidence does not establish the particular scheme charged in the indictment and submitted to the jury, in that the indictment charged (A. 20–21, 31) and the judge instructed the jury that they must find "that the

[7] The petition filed by petitioners named in the first indictment is designated as "Pet. I." The other petition is designated as "Pet. II."

scheme to defraud was devised prior to the organization of the Mantle Club, which occurred in 1928" (A. 723). Petitioners argue that there was no proof of fraud in the organization of the Mantle Club and that the evidence of fraud related to the period beginning in 1933, when the Club was expanded.

As the circuit court of appeals pointed out, this charge by the trial judge imposed an "undue burden on the government" (S. A. 194). The gist of the scheme charged in the indictment was the use of the Mantle Club as a means to defraud. Proof that at any time before the mailing of the count letters petitioners planned so to use the Club, would have been sufficient to establish the offenses as alleged. The fraud which petitioners characterize as "subsidiary" (i. e., subsequent to 1933) (Pet. I, 50–51), and which they in effect admit was established by the evidence, did not, as they contend (Pet. I, 50–52), consist of separate fraudulent transactions, unrelated to the main charge. The personal loans, the magazine purchases, the profits from the sale of costumes, all revolved around the Mantle Club and were merely particular manifestations of the basic scheme alleged in the indictment, a scheme to use the Mantle Club as a means of personal aggrandizement.

Even under the judge's charge, however, there is no deficiency in the evidence. Monjar's whole course of action, prior and subsequent to the

establishment of the Mantle Club, shows that he used his ability to organize and lead groups of men as the means of securing funds for his personal use, and justifies a conclusion by the jury that at least Monjar schemed from the start to use the Mantle Club as a device to defraud. We think that the evidence also fully justifies the conclusion that others of the petitioners, such as Cook, Jones, and Drew, who had previously worked with Monjar in the Decimo Club (A. 475–476, 494, 500; R. 1744), who were regarded by him as "tried and trusted" men (A. 456), who refused other positions in order to work with Monjar during the organization period from 1928–1933 (A. 467–469), and who without question promoted and aided the personal loan system when Monjar suggested it in 1934 (*supra*, pp. 14–17), were, from the beginning, knowing participants in a plan to use the Mantle Club to defraud. In any event, all that the jury was required to find, even under the judge's charge, was that a scheme to use the Club to defraud was devised prior to its organization. The judge correctly instructed the jury that "one man or woman may devise and accomplish it [the scheme] without assistance, but all who with criminal intent join themselves to the principal scheme are subject to the statute * * *" (A. 724); that "it is not necessary for the government to prove that all of the defendants were parties to formation of the scheme; all who participate in the scheme with a guilty knowledge thereof are as responsi-

ble as if they had joined it at the time of its formation" (A. 730–731). Since the evidence amply warrants an inference that at least one petitioner, Monjar, had devised the scheme to defraud as far back as 1928, and that the other petitioners convicted on the substantive counts knowingly furthered that scheme before the mailing of the count letters, the jury's verdict is wholly consistent with the theory on which the case was submitted to them.

The petitioners named in the second indictment charging conspiracy challenge the sufficiency of the evidence to establish their knowing participation in the fraud (Pet. II, 2, 7, 12, 13–17). We think that the evidence as set forth *supra*, pp. 23–25, fully established "more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern;" that it established "informed and interested cooperation." *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713. As to those petitioners (Maddams and Candlin) who participated in the liquidating trust arrangement, *supra*, pp. 22–23, their part in that activity, particularly when considered in conjunction with their other functions (*supra*, pp. 23–25), is sufficient to establish their guilt. As to the others, their actions as members of the national board of governors in ordering magazines and costumes cannot be explained away as mere errors of judgment. These men, as members of the board of governors, oc-

cupied fiduciary positions; the funds which they were handling were not their own. All these men had, prior to their election to the board of governors in 1940, been employed by the national board in capacities which, by their own account of their duties, must have made them aware of prior expenditures in respect of these items (see R. 1309–1310, 1517, 1531–1532, 1542, 1555, 1565, 1628). The jury, therefore, on the evidence, might well have inferred that these petitioners were aiding Monjar rather than exercising independent judgment. Moreover, they, as members of the board, were apparently willing to allow the personal loan records to be kept in the Club's offices and to allow one of their employees (petitioner Maddams) to spend half his time on P. L. activities (see *supra*, p. 24), thus actively assisting in the use of the Club as a means of securing the loans. Of course, the fact that these petitioners may not have been aware of the full extent of the P. L. fraud does not exonerate them from liability for their part in furthering the scheme. *McDonnell* v. *United States*, 19 F. 2d 801, 803 (C. C. A. 1), certiorari denied, 275 U. S. 551; *Galatas* v. *United States*, 80 F. 2d 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Craig* v. *United States*, 81 F. 2d 816, 822 (C. C. A. 9), certiorari denied, 298 U. S. 690; *Martin* v. *United States*, 100 F. 2d 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649. In addition, the

other evidence of their participation in the whole scheme, as set forth in the Statement (*supra*), fully establishes that these petitioners were generally aware of Monjar's activities and knowingly assisted him in consummating them. These petitioners seek to defend their conduct on the basis of their "steadfast adherence to an idolized leader" (Pet. II, 14), but certainly loyalty to one man does not excuse the breach of trust here proved. In this connection, the trial judge charged the jury (A. 739–740):

> * * * If, therefore, you should find that a conspiracy had originally been formed and that certain of the defendants subsequently had done things which were the object of such conspiracy, yet they would not be guilty of this charge unless in addition thereto you find that they consciously, knowingly and corruptly entered into the conspiracy that had originally been formed and that their acts were the result of a joint and corrupt concert of action.
>
> The defendants meet the entire charge contained in the indictment with the assertion and claim upon their part that whatever they did and whatever representations they made, through the mails or otherwise, was done in entire good faith and in the sincere belief in the truth of whatever they asserted to be the fact. This claim on their part, as indicated, unless overcome by the proof adduced in behalf of the gov-

ernment, negatives their guilt of the charge against them.

The jury and two courts have found that these petitioners' guilt was established by the evidence. There is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delancy* v. *United States,* 263 U. S. 586, 589–590.

2. All the petitioners contend (Pet. I, 2–3, 21, 22–30; Pet. II, 3, 12, 17–18) that the communications which form the basis of the Securities Act counts were insufficient to constitute violations of that statute. The question affects only the validity of the fines imposed against petitioner Monjar on such counts, for the other petitioners convicted on those substantive counts of the first indictment received prison sentences thereon to run concurrently with sentences imposed on a mail fraud count (see *supra,* p. 8).[8]

[8] If our interpretation of Section 17 (a), discussed in the text *infra*, is correct, there is of course no problem as to the validity of the convictions under the conspiracy count of the first indictment and under the second indictment. Even assuming that the substantive counts under the Securities Act are vulnerable to attack, it would not follow, as petitioners argue (Pet. I, 30–32; Pet. II, 17–18), that the convictions for conspiracy must be reversed. Under the judge's charge, the jury, in order to find that petitioners conspired to violate the Securities Act, had to find an agreement (1) to defraud, (2) to use the instrumentalities of interstate commerce or the mails in execution of the fraud, and (3) to sell securities (see *infra*). There is no possibility that the jury could have found that the instrumentalities of interstate

The communications were letters and telegrams directed to petitioner Cook, treasurer of the Mantle Club, and were petitioner Drew's or a loan agent's reports of the results of meetings the purpose of which was to sell securities, i. e., the P. L. loans. Enclosed in one letter was a bank draft to cover the amount of cash collected at a meeting (A. 77). The letters from the loan agents indicate that copies were sent to Drew.[9]

Petitioners argue that under Section 17 (a), prohibiting the employment of a scheme to defraud "in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails," the interstate communication or the mailing must be directed to a purchaser and must either be a step in the consummation of a particular sale or so closely related to such a sale as to be deemed a part thereof. We submit that the narrow construction urged by peti-

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commerce were used to the exclusion of the mails, for it is undisputed that P. L. agents regularly transmitted drafts for the money collected on P. L. loans to Cook by mail (see *supra*, p. 17). In finding that petitioners conspired to violate the Securities Act, the jury must therefore have found at least that petitioners conspired to use the mails in execution of a scheme to defraud, and consequently that they conspired to violate the mail fraud statute.

[9] See Count 16—Gov. Ex. 211; R. 859; Count 17—Gov. Ex. 221; R. 928, 929, indicating that a bank draft was attached; Count 18—Gov. Ex. 212; R. 860; Count 20—Gov. Ex. 77; R. 287, 254–255; Count 21—Gov. Ex. 127; R. 596, 601.

tioners is untenable. The title of the Securities Act defines its purpose as "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof." (48 Stat. 74.) The Act as a whole makes it plain that Congress intended to exercise the full extent of federal power in order to prevent the instrumentalities of interstate commerce and the mails from being used to perpetrate fraud in the sale of securities. The broad language of Section 17 (a), interdicting the employment of a scheme to defraud "in the sale of any securities by the use of" the mails or instrumentalities of interstate communication, "directly or indirectly," is clearly designed to effectuate this purpose. That language refers, not to particular sales, but to the selling of securities by such means, and cannot be read as limiting the application of the section to communications directly related to the consummation of a sale to a particular purchaser. We think it is clear that the use of the mails and means of interstate communication in furtherance of a plan to bring about a nationwide sale of securities, such as was here proved, constitutes, as the court below held (S. A. 189), use of such instrumentalities in "furtherance of the sale" of securities, within the meaning of the statute. When it is shown that such a plan is part of a scheme to

defraud, all elements of the offense defined by Section 17 (a) have been established.

It should be noted, moreover, that the selling scheme contemplated a continuing relationship with the investors and repeated efforts to induce the investors to make the pledged instalment payments and to increase the amounts of their loans. Thus, the reports of collections and transmission of funds were, in a very real sense, closely related to the particular sales being reported.

The decisions dealing with this question are in accord with this construction of Section 17 (a). *Kopald-Quinn & Co.* v. *United States,* 101 F. 2d 628, 632–633 (C. C. A. 5), certiorari denied, *sub nom. Ricebaum* v. *United States,* 307 U. S. 628; *Pace* v. *United States,* 94 F. 2d 591 (C. C. A. 5).[10] While it is true, as petitioners argue (Pet. I, 29–30), that there are factual differences between those cases and the present one, the decisions, we think, are clearly predicated on the construction given to the statute by the court below.

Petitioners contend (Pet. I, 25, 28–30) that, even if the circuit court of appeals' interpretation of the statute is correct, the verdict on the Securities Act counts cannot stand because the trial judge charged the jury that petitioners could be convicted

[10] In the *Pace* case, the nature of the mailings does not appear from the opinion but two counts were based on letters merely expressing thanks for orders for stock given to salesmen.

on those counts if the mails or interstate communications were used in execution of a scheme to defraud involving the sale of securities, rather than that such communications must be in furtherance of the sale. In point of fact, the court instructed the jury that the sales of the securities must have been made in connection with the use of the mails or instruments of interstate communication (A. 733). In any event, under the facts of this case, the plan to sell the securities and the scheme to defraud in so far as it involved the sale of the securities, were one and the same. Hence, mailings and interstate communications which furthered the fraud necessarily furthered the sale of the securities. There is here no problem, as there was in *Kann* v. *United States,* 323 U. S. 88, upon which petitioners rely (Pet. I, 28), as to whether the use of the mails was in execution of the scheme, for it is clear that the scheme had not "reached fruition" and that the communications in question were in furtherance of a continuing scheme to sell F. L. loans and to collect payments on such loans on an instalment basis.

3. There is no merit in petitioners' contention (Pet. I, 3, 22, 33–35; Pet. II, 3, 13, 18) that the trial judge improperly withdrew from the jury the question whether receipts for monies paid on accounts of the personal loans to Monjar constituted securities as defined by Section 2 (1)

of the Securities Act.[11] The trial judge read the statutory definition stated that the term, "security" includes an evidence of indebtedness and an investment contract, defined "investment contract" (A. 732–733), and, subsequently, instructed the jury as follows (A. 733–734):

> * * * The question you must decide is whether the PL and CD loans, constituting a sale of securities as the terms "sale" and "security" are defined in the Act, were made in connection with the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails; and that such sale of PL and CD loans were the result of the employment of a scheme or artifice to defraud on the part of these defendants. You must find, in order to convict under these counts, that the defendants received money from these loans and that the victims were told that the money was to be used, I quote, "to organize business concerns which would operate for the benefit of the persons making the loans." And you must also find that the money was paid over by the members with the expectation that the return to be obtained would give to such "worthy men" financial independence.

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[11] As explained at p. 31, *supra*, this contention affects only the validity of the fines imposed against Monjar on the Securities Act counts.

If this charge, to which there was no exception (Pet. I, 35), is subject to criticism, it should be on the ground that it was unduly favorable to petitioners. Accepting the interpretation of the P. L. transactions most favorable to petitioners, it is undisputed that P. L. funds were given to Monjar as a loan. True, the loan was to be repaid at Monjar's convenience, but nevertheless the money was given as a loan and not as a gift. Hence the receipt for the money was, on the undisputed evidence, an evidence of indebtedness within the definition of the statute, and the judge could properly have instructed the jury that, as a matter of law, the receipts were securities within the meaning of the Act. Cf. *Blumenthal* v. *United States,* 88 F. 2d 522, 528 (C. C. A. 8). However, the judge actually required the jury to find facts which would also establish that the receipts were investment contracts before they could convict under the Securities Act counts. The jury was instructed that petitioners could be convicted on these counts only if the victims were told that the money was to be used to organize business concerns which would operate for the benefit of the lenders and that the money was paid with the expectation that the returns would give them financial independence. The jury therefore had to find that the loans were moneys entrusted to another with the expectation of deriving a benefit or income therefrom, i. e., an investment contract. *S. E. C.* v. *Universal Service Association,* 106 F. 2d 232, 237 (C. C. A. 7), certiorari denied, 308

U. S. 622; *S. E. C.* v. *Bailey*, 41 F. Supp. 647, 651 (S. D. Fla.); *S. E. C.* v. *Payne*, 35 F. Supp. 873, 879 (S. D. N. Y.); see *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344.[12]

4. The Government offered in evidence statements given by a number of the petitioners to a special agent of the Internal Revenue Bureau (R. 1642–1758). The agent who obtained these statements testified that he had permission from the Internal Revenue Bureau voluntarily to produce the records of these statements on condition that he disclose in open court the circumstances under which the statements were obtained, i. e., that, in a conference with the attorney for the Mantle Club and Monjar personally, he had told them, "in return for the complete cooperation of the Club officials, that I would not cooperate in the S. E. C. investigation then in progress" (R. 611). He testified, both in open court and at a hearing outside the presence of the jury, that he had not cooperated with the S. E. C. or with any other government department investigating the Mantle Club (R. 611, 614, 628). The district court held that the statements were ad-

[12] The indictment alleged "the sale of a security, to wit, a certain evidence of indebtedness * * *" (e. g., A. 75). That the security was shown also to be an investment contract or even to be only an investment contract would constitute an immaterial variance. See *Berger* v. *United States*, 295 U. S. 78, 81; *Westmoreland* v. *United States*, 155 U. S. 545, 549; *McIntosh* v. *United States*, 1 F. 2d 427, 428 (C. C. A. 7).

missible in evidence (A. 216–220) and the circuit court of appeals, after petitioners' application for rehearing was filed, amended its opinion to include a holding that such admission was proper (S. A. 228–229). Petitioners contend (Pet. I, 3, 22, 35–41; Pet. II, 3, 13, 19) that these statements were confessions of guilt obtained by inducement of reward and therefore inadmissible in evidence under the decision of this Court in *Bram* v. *United States,* 168 U. S. 532. There is no merit in this contention. The statements were not confessions of guilt; they were merely admissions of fact from which, together with the other evidence adduced at the trial, guilt might be inferred. Nowhere in any of the statements did any of the petitioners acknowledge the element which is necessary to give the color of guilt to their admitted acts—the intent to defraud. Cf. *Ercoli* v. *United States,* 131 F. 2d 354, 356 (App. D. C.); *Rand* v. *United States,* 45 F. 2d 947, 949 (C. C. A. 3).

Furthermore, the circumstances under which the statements here involved were obtained are very different from those established in the *Bram* case. That case does not hold, as petitioners contend (Pet. I, 39), that a confession, "even if voluntary," may not be offered in evidence if shown to have been induced by promises. The decision in the *Bram* case turned on the fact that this Court found that, in all the circumstances, the confession there involved was not voluntary.

Bram, accused by the investigating officers of murder, while being stripped of his clothing,[13] made the statements which were offered as a confession, and this Court held that the circumstances refuted "any possible implication that his reply to the detective could have been the result of a purely voluntary mental action." 168 U. S. at p. 562; see also pp. 563–564. Petitioners' statements in the present case were made during the course of an investigation not related to the crimes for which they were subsequently tried. Petitioners made the statements after having had an opportunity to consult with counsel, after being informed of their constitutional rights, and, except in the case of Willard, with counsel present (R. 1642, 1670, 1678, 1704, 1736, 1742). Clearly the promise not to cooperate with the S. E. C. investigation was not the kind of hope or inducement of reward which would lead a person questioned under circumstances under which these petitioners were examined, falsely to accuse himself. There is therefore no basis for holding petitioners' statements inadmissible in evidence.

CONCLUSION

The case was correctly decided below and presents no conflict of decisions. We therefore re-

[13] This Court thought that factor sufficiently important to italicize its statement of such fact. 168 U. S. at p. 561. See *United States* v. *Lonardo*, 67 F. 2d 883, 885 (C. C. A. 2).

spectfully submit that the petitions for writs of certiorari should be denied.

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(33)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 1104-1108

HUGH B. MONJAR, ALSO KNOWN AS H. B. MONJAR; JOSEPHINE T. MONJAR, ALSO KNOWN AS MRS. HUGH B. MONJAR, ALSO KNOWN AS JOSEPHINE T. DREW; ABRAHAM J. COOK, ALSO KNOWN AS A. J. COOK; JOHN FENTON JONES, ALSO KNOWN AS J. F. JONES; CLEMENT O. DREW, ALSO KNOWN AS C. O. DREW,

Petitioners,

vs.

UNITED STATES OF AMERICA

Nos. 1109-1115

DONALD F. MOORE, JOHN E. LINDH, JAMES J. FITZPATRICK, ERNEST F. WILLARD, CLARENCE W. CANDLIN, LEONARD B. CRUSER AND WALTER H. MADDAMS,

Petitioners,

vs.

UNITED STATES OF AMERICA

REPLY BRIEF

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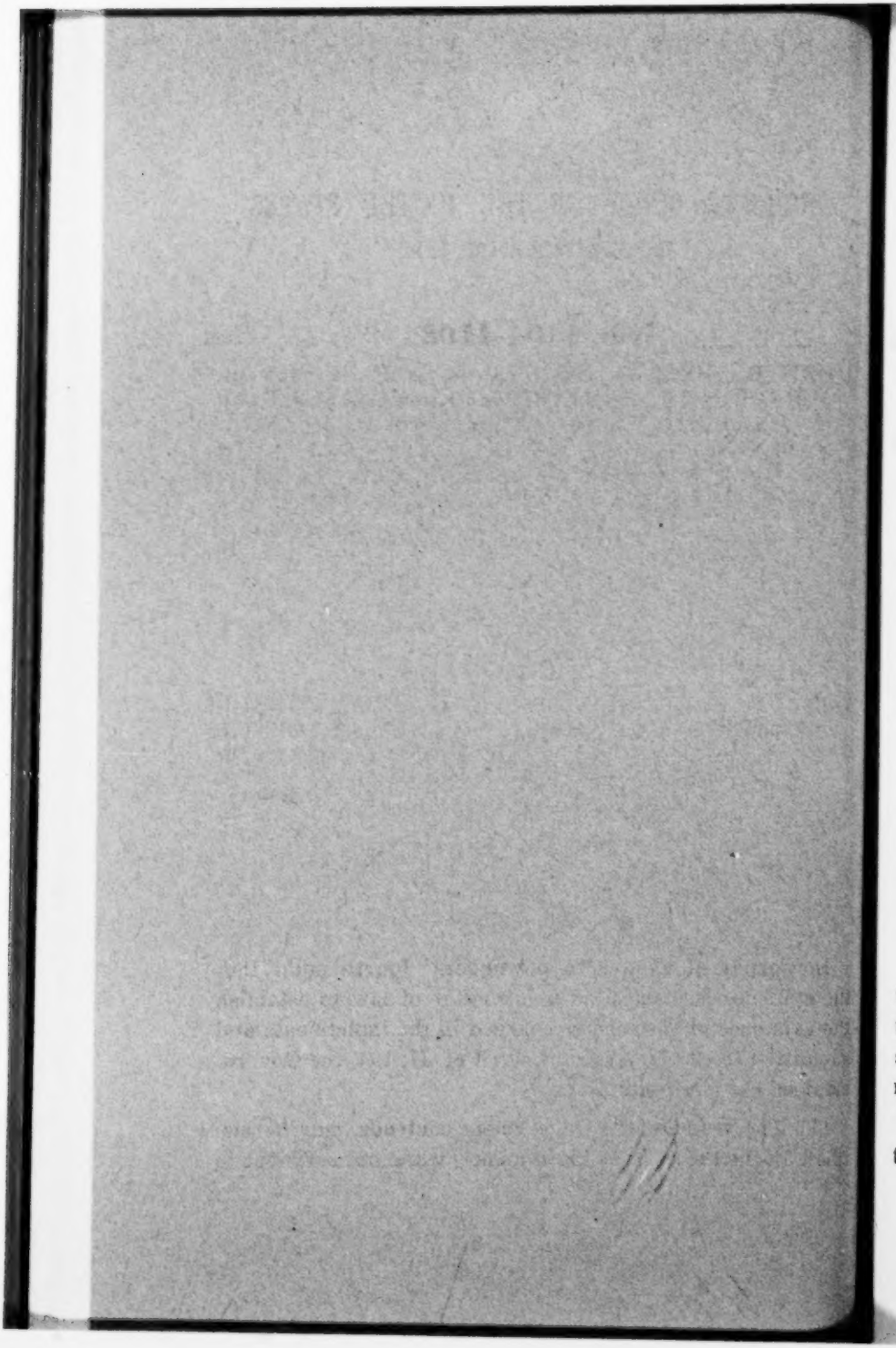

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 1104-1108

HUGH B. MONJAR, Also Known as H. B. Monjar; JOSEPHINE T. MONJAR, Also Known as Mrs. Hugh B. Monjar, Also Known as Josephine T. Drew; ABRAHAM J. COOK, Also Known as A. J. Cook; JOHN FENTON JONES, Also Known as J. F. Jones; CLEMENT O. DREW, Also Known as C. O. Drew,

Petitioners,

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UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA

REPLY BRIEF

In purported answer to petitioners' fourth point that the evidence is insufficient as a matter of law to establish the existence of the scheme charged in the indictments and submitted to the jury (Pet. I, 40; Pet. II, 19), the Government makes two contentions:

(1) The verdicts, the Government contends, may be justified on the theory that the evidence, while not sufficient to

show the scheme charged and submitted, is nevertheless adequate to support a finding of guilt of another scheme to defraud if such scheme had been submitted to the jury (Br. in Opp. 26). It is asserted by the Government that "The gist of the scheme charged in the indictment was the *use* of the Mantle Club as a means to defraud;" that "The personal loans, the magazine purchases, the profits from the sale of costumes, all revolved around the Mantle Club[1] and were merely particularly manifestations of the basic scheme alleged in the indictment, a scheme to *use* the Mantle Club as a means of *personal aggrandizement.*"

(2) In any event, the Government urges, the evidence was sufficient as a matter of law to sustain the finding of a scheme as submitted to the jury (Br. in Opp. 26-28).

Neither argument has support in fact or in law.

1. In essence, the suggestion is that although the prosecuting attorneys repeatedly stated that the alleged scheme to defraud included as a part thereof the formation of the Mantle Club and relied on this element as justifying introduction of much evidence otherwise inadmissible; and despite the fact that the trial court accordingly by its instructions charged that the scheme alleged in the indictment was "to create that [Mantle] Club" as an instrument of fraud and that no conviction could be had unless it was found that the scheme to defraud was devised prior to the organization of the Club, nevertheless the verdict may be sustained by restudying the evidence and suggesting another and more limited scheme which **might** have been submitted to the jury and as to which **if** submitted to the

[1] Contrary to the Government's statement (Br. in Opp. 26), petitioners do not concede directly or "in effect" that any fraud was established by the evidence.

jury and if the jury had found the defendants guilty thereon, there was evidence sufficient as a matter of law.

The argument is more than slightly "iffy."

It is hornbook law that the right to trial by jury prevents the sustaining of a verdict on some ground other than that submitted to and considered by the jury. As stated in *Hendrey* v. *United States*, 233 Fed. 5, 16 (C. C. A. 6, 1916):

> "it cannot be permitted that any respondent shall be charged with one crime and convicted of another merely because the latter is developable out of the proof which fails to show the crime charged."

The Government seems to contend that the *use* of the Club involved a decision at some time (without stating any time) to use the Club generally from that time on for fraudulent purposes. For the costume transaction, the Key magazine transaction, the payment of salaries, etc., to which the Government refers, all occurred at different times and the scheme to *use* the Club could hardly include all those transactions unless the "use" means to use it generally from some time forward.

Our position is that it is impossible for this Court to assume that the jury found the defendants guilty of a scheme to use the Club in this broader sense, when the Government at the trial did not urge and the court in its instructions did not charge that such was the kind of scheme of which the defendants were accused.

The Government seeks to suggest an interpretation of the scheme charged in the indictment by which it may justify all the evidence introduced and a verdict of guilty. Aside from our proposition that this is a scheme different from that on which the defendants were tried and as defined by the trial court, the Government's argument involves the additional flaw that such a scheme is not necessarily the scheme on which the jury based its verdicts of guilty. It

certainly is as reasonable to believe that they erroneously found the defendants guilty of different schemes, *i. e.*, guilty of the scheme as charged by the court, or guilty of one or more other schemes: to sell PL's fraudulently; to purchase American Key; to sell the Code of Ethics or the Supplement to the Code of Ethics; to purchase costumes; to set up various business corporations named in the indictment; to pay themselves salaries, etc., and to set up the Independence Club. With respect to practically all of these transactions the evidence of fraud was insufficient as a matter of law but, if it is permissible to speculate as to which scheme the jury may have chosen to rely upon, then it cannot be said that the jury may not have founded its verdicts on the determination, erroneous in law, that one or more of these transactions were fraudulent even though the evidence was insufficient as to it or them.

Even if it were permissible to assume that the jury ignored the instructions of the court as to what constituted the scheme charged, and instead ranged guideless through the evidence and found the defendants guilty of furthering or employing some other scheme—which must necessarily be known only to the jurors—this would still be an obviously inadequate premise upon which to base the contention of the government that the scheme upon which the verdicts were founded was that which for the first time is now suggested by the Government. For it is plain that once the charge to the jury is ignored the court must embark on a sea of speculation as to what scheme the jury may have relied upon and there is opened up a whole series of equally permissible hypotheses as to what the jury may have relied upon as the basis of the verdicts. It could be urged with equal force that the jury might possibly have found that one or more of the several transactions mentioned in the indictment were fraudulent (though there was no sufficient evidence to sus-

tain a verdict of guilty as to any defendant except possibly as to personal loans). In other words, if this Court considers any scheme other than that which was urged at the trial by the Government and defined by the trial court in its charge, there is no way of knowing what kind of a fraudulent use of the Club the jury found, nor whether there was more than one kind of fraudulent use of the Club. Therefore, if we depart from the scheme charged by the court, there are many transactions which were in evidence and may have been relied upon by the jury as the basis for its verdicts and many of these transactions were clearly inadequate to support a finding of a scheme to defraud. It follows that this Court should not support a verdict on the ground that *if* the scheme to defraud now suggested by the Government had been submitted to the jury and *if* it was the basis of the jury's verdicts, the evidence is sufficient to sustain such verdicts.

The Government suggests (Br. in Opp. 26) that the indictment alleges "a scheme to use the Mantle Club as a means of personal aggrandizement." Government counsel never mentioned such a scheme at the trial, and it is different from the scheme specified by the trial judge in his charge to the jury. A scheme to use the Mantle Club for personal aggrandizement is entirely too flexible under the evidence in this case. If it is intended to mean the use of the Club for personal aggrandizement by the sale of PL's, such would hardly apply to anyone except Mr. Monjar, who was the one who profited thereby. There is no sufficient evidence to justify a verdict that any other transaction was fraudulent. Therefore, no other defendant used the Club for his aggrandizement. With this understanding of the use of the Club, a conviction even of Monjar would be faulty because of the refusal of the trial court to take from the jury the evidence as to all transactions other than the personal loans.

2. Careful examination of the Government's brief in opposition discloses that it does not even purport to answer, other than by denial in the form of a mere conclusion, petitioners' contention that under the judge's charge the verdict was sustainable only by resort to an arbitrary and illicit retrospective presumption as to the existence of fradulent purpose at the time of the formation of the Mantle Club (Pet. I, 41, 46-50; Pet. II, 19-20). The Government states (Br. in Opp. 26-27):

> "Monjar's whole course of action, prior and subsequent to the establishment of the Mantle Club, shows that he used his ability to organize and lead groups of men as a means of securing funds for his personal use, and justifies a conclusion by the jury that at least Monjar schemed from the start to use the Mantle Club as a device to defraud."

With respect to Monjar's course of action prior to the establishment of the Mantle Club the Government sets out the facts upon which it relies at pages 9 and 10 of its Brief in Opposition. It is highly significant that none of the facts there outlined permit of the inference that Monjar in using "his ability to organize and lead groups of men as the means of securing funds for his personal use" did so in any manner amounting to fraud.

The only other reference to the evidence as to the existence of a scheme at the time of the organization of the Club appears in the Government's conclusion, again without reference to any supporting evidence (Br. in Opp. 28), "since the evidence amply warrants an inference that at least one petitioner, Monjar, had devised the scheme to defraud as far back as 1928 * * *."

We have demonstrated in our main brief the fallacy of the reasoning of the circuit court of appeals, and as shown above, the Government in its brief does not even purport

by reference to the record to show any support in the evidence to sustain its assertion (Br. in Opp. 26) that there was evidence of fraudulent purpose in the organization of the Club.

Conclusion

The arguments of the Government addressed to the other points of the petitions requires no reply.

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